

EXHIBIT B.111

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARK I. SOKOLOW, et al.,)
Plaintiffs,)
v.) Civil Action No.
THE PALESTINE LIBERATION)
ORGANIZATION, et al.,)
Defendants.)

)

DEPOSITION OF MICHAEL SFARD
JERUSALEM, ISRAEL
OCTOBER 24, 2013

REPORTED BY: BRENDA MATZOV, CA CSR NO. 9243

Page 3

1 ALSO PRESENT:
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3 DINA ROVNER, Esq.
4 AHARON MISHNAYOT, Advocate
5 NOA AMRAMI, Advocate
6 SHIRIN ASHERIAN
7 YVETTE ESSAKHAR
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1 Deposition of MICHAEL SFARD, taken in the
2 above-entitled cause pending in the United States
3 District Court, for the Southern District of New York,
4 pursuant to notice, before BRENDA MATZOV, CA CSR 9243,
5 at the King David Hotel, Jericho III Room, Jerusalem,
6 Israel, on Thursday, the 24th day of October, 2013,
7 at 9:06 a.m.

10
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| NUMBER | DESCRIPTION | MARKED |
| Exhibit 111 | Document Entitled "Expert Report by Adv. Michael Sfard," Dated July 15, 2013 (No Bates Number) | 35 |
| Exhibit 112 | Article Entitled "Palestinians Sue State Over Migron Land," Dated October 5, 2008 (No Bates Number) | 27 |
| Exhibit 113 | Article Entitled "Top Lawyers Debate: Will Turkel Report be Implemented?" Dated June 26, 2013 (No Bates Number) | 58 |
| Exhibit 114 | Article Entitled "State Says International Laws of Armed Conflict Apply to Palestinian Terrorism," Dated December 11, 2005 (No Bates Number) | 63 |

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| 1 | PLAINTIFFS' EXHIBITS | | | |
| 2 | NUMBER | DESCRIPTION | MARKED | |
| 3 | Exhibit 115 | Document Entitled "Israel Military Order No. 378, Order Concerning Security Provisions" (No Bates Number) | 81 | 1 But I was also studying full time. So it was not easy. 2 But I remember those years as good years. 3 Q. Did you -- did you find Hebrew University 4 to be a place of tolerance? |
| 4 | Exhibit 116 | Hebrew Document (No Bates Number) | 81 | 5 A. The Hebrew University has -- and the law 6 faculty where I studied has students that are both 7 Jewish and Arabs. To be honest, looking back, I think 8 that the two communities were completely separated from 9 one another. I don't recall any friends that I made 10 during those years with Palestinian students. |
| 5 | Exhibit 117 | Michael Sfard's Case Notes (No Bates Number) | 156 | 11 I remember a huge row in my law faculty 12 when Christian students wanted to place a Christmas 13 tree in the faculty before Christmas. There was a huge 14 issue around it. Eventually, if I remember correctly, 15 a Christmas tree was placed. But it generated a lot 16 of hostility. |
| 6 | | | | 17 (Brief interruption in the proceedings.) |
| 7 | | | | 18 MR. YALOWITZ: Why don't we pause while the 19 hotel staff give us an extra table. Thank you. |
| 8 | | | | 20 We can go off. |
| 9 | | | | 21 (Brief pause in the proceedings.) |
| 10 | | | | 22 Q. BY MR. YALOWITZ: Do you wish to add 11 any -- |
| 11 | | | | 23 A. At the same time -- |
| 12 | | | | 24 Q. Do you wish to add anything further before |
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| 1 | PROCEEDINGS | | | |
| 2 | | | | |
| 3 | MICHAEL SFARD, called as a witness, being first duly sworn, was examined and testified as hereinafter set forth. | | | 1 we -- you were speaking before we were interrupted. 2 Do you wish to add anything further? |
| 4 | | | | 3 A. I'll just sum up and say that there were 5 things that I can describe, in retrospect, as very 6 problematic in -- in the faculty. But there were also 7 a lot of things that provided what we would call here in Israel a liberal way of thinking. And that's it. |
| 5 | | | | 8 Q. Do you remember where you were when the cafe 9 at Hebrew University was bombed? |
| 6 | | | | 10 A. I was not a student in the Hebrew University. 11 Q. You had graduated -- 12 A. That's right. |
| 7 | | | | 13 Q. -- several years before? |
| 8 | | | | 14 A. That's right. |
| 9 | EXAMINATION BY MR. YALOWITZ: | | | 15 Q. But that's why I'm asking you. 16 Do you remember where you were when you found 17 out? |
| 10 | Q. Where did you go to university? | | | 18 A. No, I don't remember where I was. 19 Q. Following graduation, you went to work for 20 Avigdor Feldman; is that right? |
| 11 | A. I've done my LLBs at the Hebrew University in Jerusalem. | | | 21 A. That's right. |
| 12 | Q. What year did you graduate from Hebrew University? | | | 22 Q. And could you describe Mr. Feldman? |
| 13 | A. 1998. | | | 23 A. Mr. Feldman is a very famous, renowned Israeli 24 lawyer. He has made his name known as a human rights 25 attorney in the '70s, '80s, and '90s. He is probably |
| 14 | Q. Did you -- did you like it there? | | | |
| 15 | A. I liked it a lot. | | | |
| 16 | Q. What was it like? | | | |
| 17 | A. What was, like, my law school years? | | | |
| 18 | Q. Yeah. | | | |
| 19 | A. They were hectic. I was working as a -- | | | |
| 20 | as a legal reporter for the Jerusalem local weekly called Ha'ir. So I was spending a lot of time in court in the Jerusalem district, in the Supreme Court, in the Magistrate's Court, in the employment tribunals. | | | |
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| <p style="text-align: right;">Page 9</p> <p>1 the most famous Israeli human rights attorney of those 2 years.</p> <p>3 What else do you want to know about him?</p> <p>4 Q. He has a criminal practice as well; is that 5 right?</p> <p>6 A. Yes. In the '90s, he moved more, gradually, 7 to criminal practice. I mean, also before, he was 8 practicing criminal law, but as part of his human 9 rights activities in the sense of defending -- in -- 10 in connection to the Israeli-Palestinian conflict 11 mainly, I think, in the military courts in the West 12 Bank and Gaza.</p> <p>13 But during the '90s, he moved gradually more 14 to what we term as regular criminal law.</p> <p>15 Q. Do you think his fame and renown are well 16 deserved?</p> <p>17 A. I think he is the best lawyer. If I would 18 be in trouble, I would like him to be my lawyer.</p> <p>19 Q. Do you think that his commitment to human 20 rights remains unwavering?</p> <p>21 A. I do.</p> <p>22 Q. What -- what's the name of the thing you do 23 that we call "internship" here? It's called "staj" 24 or something like that?</p> <p>25 A. In English, we call it "internship."</p> | <p style="text-align: right;">Page 11</p> <p>1 Q. Do you -- do you recall the first time you 2 appeared and spoke in a military court?</p> <p>3 A. I don't remember the first occasion. But 4 I am almost positive it was a detention proceeding, 5 extension of detention proceeding. And I'm -- and I 6 think it was in one of the extensions of the military 7 court, the extension in Petach Tikva. But, you know, 8 it's 15 years ago, 14 years ago. I can't be positive.</p> <p>9 Q. Can you estimate how many times, in your 10 first year, you appeared with Mr. Feldman in a military 11 court?</p> <p>12 A. I can't. I mean, it was so long ago, I 13 just -- and I can't make the distinction between the 14 first year and the -- the second or third year. But 15 in -- in general, we had cases in the military courts, 16 and I've been traveling to the military courts now 17 and then.</p> <p>18 Q. Did you learn, in your first year, of the 19 existence of Shabak files?</p> <p>20 A. I learned about that long before I went into 21 internship.</p> <p>22 Q. How did you learn about it?</p> <p>23 A. Well, because I guess my work as a -- as 24 a reporter for Kol Ha'ir I covered security related 25 trials in the civil Israeli courts, in the Jerusalem</p> |
| <p style="text-align: right;">Page 10</p> <p>1 Q. And you did that from '98 to '99?</p> <p>2 A. That's right.</p> <p>3 Q. Did you work in criminal practice with 4 Mr. Feldman or human rights or both?</p> <p>5 A. Both.</p> <p>6 Q. And during your internship year, you did 7 not appear in court; is that right?</p> <p>8 A. In general, I did not appear in court.</p> <p>9 Although, in the second half of my internship, it 10 is permissible, according to the Bar regulations, 11 to appear in certain instances. I recall that I 12 did appear but very, very rarely.</p> <p>13 Q. Did you appear, during that year, in the 14 Judea military court?</p> <p>15 A. Only with Mr. Feldman.</p> <p>16 Q. How about the Samaria military court?</p> <p>17 A. Well, when you said the "Judea," I didn't 18 mean specifically Judea. I mean military courts in 19 general. It's 15 years ago. I don't remember exactly 20 where we were. But, in principle, we had cases at 21 the military courts in -- I -- if I remember correctly, 22 back then, the Judea court was in Beit El, not in 23 Ofer as today. And we did appear both in -- in those 24 tribunals. I mean, he did the litigation. I was 25 second chair.</p> | <p style="text-align: right;">Page 12</p> <p>1 District Court, Magistrate's Court.</p> <p>2 Q. What we would call civilian courts?</p> <p>3 A. Civilian courts. That's what I meant.</p> <p>4 And by covering these cases, I learned about 5 the fact that those type of cases -- the organ that is 6 conducting the investigation is the GSS rather than the 7 police.</p> <p>8 Q. Is that something that's commonly known among 9 people who follow legal matters in Israel?</p> <p>10 A. I wouldn't know if it is common. I would 11 expect that it would be known among lawyers who practice 12 security related cases.</p> <p>13 Q. Now, after you completed your internship, 14 you stayed with Mr. Feldman for a second year before 15 continuing your education; is that correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And did you appear alone in court that second 18 year?</p> <p>19 A. I did.</p> <p>20 Q. Did you appear alone in any military court 21 that second year?</p> <p>22 A. I suppose I did. I remember cases that I 23 appeared. To be sure whether it was on that second 24 year or the fourth year or the third year, I'm not sure. 25 But I'm almost positive that it was in the second year.</p> |

1 Q. Do you -- did you ever examine a witness in
 2 a military court?
 3 A. I have.
 4 Q. Can you recall the first one?
 5 A. I can't recall the first one. I recall
 6 bits and pieces of -- lawyers tend to re-examine their
 7 witnesses even when the examination ends. So I have
 8 those cases that I keep on thinking of.
 9 Q. Which ones?
 10 A. Well, I -- I don't think it's appropriate
 11 for me to get into specific cases. But I remember
 12 cases where I had to cross-examine witnesses in the
 13 military courts, an accomplice who made a incriminated
 14 state -- incriminating statement in his investigation
 15 against my client, things of that sort.
 16 Q. Do you recall -- can you give an estimate
 17 of how many witnesses you've examined in the military
 18 courts?
 19 A. No, I can't. I don't know.
 20 Q. Less than ten?
 21 A. I would expect -- I think more, but -- but
 22 that's the ballpark.
 23 Q. Do you --
 24 A. I mean, in -- in case -- in trials, not in
 25 detention proceedings.

1 Q. In criminal trials?
 2 A. In criminal trials.
 3 Q. Thank you for that clarification.
 4 A. And, you know, in the military courts,
 5 there are also appeals tribunals. And I appeared
 6 there regularly. And you cross-examine witnesses
 7 there as well. So --
 8 Q. How many appeals do you estimate you argued
 9 in the military courts?
 10 A. Very small number.
 11 Q. And do you give oral summations or written
 12 summations in the military court system?
 13 A. In -- in criminal cases?
 14 Q. Criminal cases.
 15 A. Oral summations and sometimes written
 16 summations as a supplement or, if agreed -- only
 17 if agreed by the parties, only written summations.
 18 Q. Do you recall how many oral summations
 19 you've given in the military courts in criminal trials?
 20 A. No. And I'm not sure I have.
 21 Q. Following your second year of practice, you
 22 continued your studies in England?
 23 Is that -- do I have that right?
 24 A. UCL, University College of London.
 25 Q. And you studied human rights law?

1 A. International protection of human rights.
 2 Q. Did you do a thesis or a essay or something --
 3 anything like that --
 4 A. I had -- had --
 5 Q. -- as part --
 6 A. -- written --
 7 Q. -- of your studies?
 8 A. Sorry. I've written two essays in two of
 9 the seminars that I took. And my -- and I earned an
 10 LLM.
 11 Q. And that took one year?
 12 A. That took one year, September to September.
 13 Q. So -- so September of 2001 you returned to
 14 Israel; is that right?
 15 A. That's right.
 16 Q. Is that before or after September 11th?
 17 A. Eight days before September 11th. I was
 18 looking for an apartment to rent when I heard of the
 19 9/11 bombings.
 20 Q. Everybody seems to remember where they were
 21 when they heard about 9/11.
 22 A. Yeah.
 23 Q. You returned to work with Mr. Feldman?
 24 A. Not immediately. I had a few months in
 25 which I wrote a report for the Israeli human rights

1 organization the Public Committee Against Torture in
 2 Israel on the newly self-proclaimed policy of targeted
 3 killings or what I term as assassinations. And I think
 4 it was December when I returned to Avigdor's office,
 5 but maybe November.
 6 Q. The Public Committee Against Torture in
 7 Israel, that's the -- that's the group that brought
 8 the landmark case involving GSS investigations?
 9 A. You mean torture? Yes.
 10 Q. Is -- is it -- I mean, are we -- are you
 11 being flip, or do you think every GSS investigation
 12 is torture?
 13 A. No. The -- the issue at stake in that
 14 case was five techniques of physical abuse of -- of
 15 detainees and its aspects, which amount to torture.
 16 Q. Either torture or cruel, degrading, and
 17 inhuman treatment?
 18 A. I agree.
 19 Q. And do I have it right that the High Court
 20 concluded that whether you define those investigative
 21 techniques as torture or as cruel, degrading, or
 22 inhuman treatment doesn't matter, they're forbidden?
 23 A. Correct. Well, with one exception.
 24 The court did leave a narrow -- well, I don't
 25 know how narrow, but it left an exception. And that

1 was, under terms of the necessity defense, the criminal
 2 defense of necessity, it would be permissible for a
 3 GSS investigator, interrogator to use physical means
 4 of interrogation. And indeed, in later years, the GSS
 5 has invoked the necessity exception.

6 Q. Does -- does an -- I'm a little ahead of
 7 myself. But since you raised it, I'll ask.

8 Is it your understanding that an investigation
 9 that -- that evidence obtained through the use of the
 10 investigative techniques that were discussed in the
 11 Public Committee Against Torture case, is it your
 12 understanding that such evidence is admissible in
 13 a criminal court case?

14 A. There is no blanket rule about this.
 15 According to the Supreme Court ruling, such statements
 16 can be admissible and the court -- the criminal court
 17 has to examine on a case-by-case basis whether these
 18 techniques have undermined the interviewer -- the
 19 interviewee's freedom of will.

20 Q. And if the court concludes that the accused's
 21 freedom of will was interfered with, what does the
 22 court do?

23 A. Then it has to suppress the evidence, the
 24 statement.

25 Q. Has that happened?

1 A. I'm not aware of cases where it happened.

2 Q. Has it been --

3 A. But it might.

4 Q. Has it been raised?

5 A. The argument that an out-of-court statement
 6 should be suppressed because of such methods, yes, it
 7 has been raised frequently in the past.

8 Q. Okay. To come back, you returned to work
 9 with Mr. Feldman in approximately December of '01 and
 10 you stayed --

11 A. December of '01. Sorry.

12 Q. And you stayed with him for how long?

13 A. Until, I think, April of 2004.

14 Q. And when -- when I was asking you earlier
 15 about the number of times you've examined witnesses
 16 and presented oral summations, you -- you were having
 17 trouble distinguishing among your time before you
 18 went to England and then your time after. But you
 19 were referring to the entire time that you were with
 20 Mr. Feldman?

21 A. Regarding the IMC?

22 Q. Yes.

23 A. Only at the IMC?

24 Q. Yes.

25 A. I would say that I've been involved,

1 during that time, probably in a dozen cases. In
 2 the vast majority of them, Mr. Feldman was conducting
 3 cross-examinations. I don't recall exactly when, but
 4 there's -- I have no doubt that, in some of those cases,
 5 I have cross-examined some of the witnesses, the less
 6 important witnesses. How many they were I cannot say.

7 Q. And have you argued appeals at the court of
 8 military appeals -- Military Court of Appeals?

9 A. I remember appearing at the Military Court
 10 of Appeals. I don't remember if it was in an appeal
 11 against a judgment of a criminal case or in the
 12 detention proceedings. I truly -- or there is another
 13 option, in a request to lift an immunity certificate.
 14 I don't recall what was the exact subject matter. But
 15 I did appear in the Court of Appeals.

16 Q. Did your work with Mr. Feldman focus on human
 17 rights matters as well?

18 A. I would say that between 40 and 50 percent
 19 of my time -- well, no, I exaggerate. About a third
 20 of my time was human rights cases.

21 Q. And was that -- was that work principally
 22 in the High Court of Justice?

23 A. Principally, yes.

24 Q. So how many times would you estimate you
 25 appeared in the High Court of Justice when you were

1 with Mr. Feldman?

2 A. This is very difficult to answer, you know.
 3 I -- many. But what -- what does constitute "many"?

4 Q. More than 50?

5 A. Less than 50.

6 Q. More than 25?

7 A. Maybe. Probably yes.

8 Q. When you worked with Mr. Feldman on those
 9 dozen or so cases in the military courts, were your
 10 clients Palestinians?

11 A. There are no non-Palestinian accused in
 12 military courts. So yes, they were Palestinians.

13 Q. And how did you communicate with them? Do
 14 you speak Arabic?

15 A. We usually had either an intern or a lawyer
 16 that speaks Arabic. Or we had a -- the help of someone
 17 who could translate. Some of them knew Hebrew to the
 18 extent that we needed to communicate depending on --
 19 on each case.

20 Q. This is my fault because I asked a
 21 multiple-part question.

22 But do you yourself speak Arabic?

23 A. No.

24 Q. Does Mr. Feldman?

25 A. No.

| | |
|--|---|
| <p style="text-align: right;">Page 21</p> <p>1 Q. Do you or he read Arabic?</p> <p>2 A. No.</p> <p>3 Q. You formed your own firm in '04 or '05?</p> <p>4 A. In 2004.</p> <p>5 Q. What would you describe as the mix between</p> <p>6 human rights work and criminal defense work?</p> <p>7 A. We do a very small amount of criminal defense</p> <p>8 work. Most of our criminal cases are representation</p> <p>9 of Israeli and Palestinian human rights defenders,</p> <p>10 activists, in very minor offenses. So most of the --</p> <p>11 most of my practice is human rights.</p> <p>12 Q. When you say "minor offenses," you mean</p> <p>13 things like civil disobedience?</p> <p>14 A. That's right.</p> <p>15 Q. Laying down in front of a tank or something</p> <p>16 like that?</p> <p>17 A. Hopefully not a tank, but yes.</p> <p>18 Q. Joining arms together singing "We Shall</p> <p>19 Overcome," this kind of thing?</p> <p>20 A. The Israeli 2013 version of it, yes.</p> <p>21 Q. All right. Have you -- have you ever</p> <p>22 represented anybody who was accused of a serious</p> <p>23 security violation?</p> <p>24 A. I have.</p> <p>25 Q. Who?</p> | <p style="text-align: right;">Page 23</p> <p>1 A. That's right.</p> <p>2 Q. -- their sentences?</p> <p>3 A. Correct.</p> <p>4 Q. Are parole hearings of public record?</p> <p>5 A. Sorry?</p> <p>6 Q. Are parole hearings of public record?</p> <p>7 A. Parole hearings are of public record. I'm</p> <p>8 not sure whether -- I think there is an issue with the</p> <p>9 name on the identity of the -- of the prisoner. I think</p> <p>10 they omit the name of the prisoner. I don't remember</p> <p>11 exactly why. But as far as I remember, these judgments</p> <p>12 are -- you know what? I don't want to guess. I don't</p> <p>13 remember. I know that parole judgments are published.</p> <p>14 They are public. It might be that there is an issue</p> <p>15 with the identity of the prisoner.</p> <p>16 Q. I suppose that could be checked?</p> <p>17 A. Yes. Absolutely.</p> <p>18 Q. Okay. In connection with your human rights</p> <p>19 work, I've -- I have learned that you're quoted in the</p> <p>20 press from time to time.</p> <p>21 Is that true?</p> <p>22 A. It's true that I am quoted. I'm not -- I'm</p> <p>23 not sure that always the quote is accurate. But -- no,</p> <p>24 I'm kidding.</p> <p>25 Q. Well, let me ask you about some.</p> |
| <p style="text-align: right;">Page 22</p> <p>1 A. You expect me to name names?</p> <p>2 Q. Only if it's public. Only if it's somebody</p> <p>3 who is -- well, let me ask a different question, then.</p> <p>4 Because I don't want -- I certainly don't want to</p> <p>5 interfere with any attorney-client relationships you</p> <p>6 have. So I'll withdraw the question, and I'll ask</p> <p>7 a different one.</p> <p>8 Have you defended anybody in a criminal case</p> <p>9 accused of a serious security offense?</p> <p>10 A. Yes, I have.</p> <p>11 Q. Please say who that is.</p> <p>12 A. I was second-chairing the case of Smirek</p> <p>13 that later went to the Supreme Court. He was a</p> <p>14 German national that was indicted, charged with</p> <p>15 planning, assisting a terror organization, Hezbollah.</p> <p>16 Q. Stephen Smirek?</p> <p>17 A. Stephen Smirek.</p> <p>18 I have litigated one or two cases myself</p> <p>19 in the military courts in which my clients were charged</p> <p>20 with homicide, among other charges. I have and still</p> <p>21 represent Palestinian prisoners in parole boards. And</p> <p>22 they were all sentenced to long terms for -- for serious</p> <p>23 crimes and involvement in terror attacks.</p> <p>24 Q. You go with them to the parole board and ask</p> <p>25 the parole board to give them early release from --</p> | <p style="text-align: right;">Page 24</p> <p>1 You were quoted as commenting about mining</p> <p>2 operations or quarrying operations in the West Bank?</p> <p>3 A. Yeah.</p> <p>4 Q. And it -- you were commenting on the practice</p> <p>5 of quarrying stone in the West Bank and using it to</p> <p>6 make construction materials in Israel; is that right?</p> <p>7 A. Yes, I have.</p> <p>8 Q. And I think you were quoted as saying you</p> <p>9 felt that was a war crime?</p> <p>10 A. I have.</p> <p>11 Q. Do you -- do you believe that to be a war</p> <p>12 crime?</p> <p>13 A. Well, I -- if I was quoted accurately, I</p> <p>14 would have been quoted that it might amount to a war</p> <p>15 crime. Because in order for a war crime to be a war</p> <p>16 crime -- for an act to be a war crime, it's not enough</p> <p>17 that the facts are as defined in the -- in the crime,</p> <p>18 but also there's a need for a mens rea. But I do</p> <p>19 believe that -- that taking away natural resources</p> <p>20 from an occupied territory might amount to the crime</p> <p>21 of pillage.</p> <p>22 Q. Do you -- do you have any cases involving</p> <p>23 that, or were you more commenting about it as a --</p> <p>24 A. There's a --</p> <p>25 Q. -- matter of public interest?</p> |

1 A. There's an ICJ, International Court of Justice
 2 case, recent case, between Uganda and the Congo.
 3 Q. I'm sorry. I asked a bad question.
 4 What I meant was: Are you personally working
 5 on a case involving that issue?
 6 A. Aah. I have filed a High Court petition
 7 on behalf of the Israeli human rights organization
 8 Yesh Din, challenging the civil administration in
 9 the West Bank's practice to provide permits to Israeli
 10 corporations to excavate natural resources, arguing
 11 that it's in violation of international humanitarian
 12 law.
 13 Q. Is that case pending?
 14 A. No, it's not.
 15 Q. How did it come out?
 16 A. The Supreme Court has dismissed the case
 17 on the basis of laches I think it's called.
 18 Q. Laches.
 19 A. Laches. And also made some obiter dictum
 20 assertions that, since we're dealing with a long-term
 21 occupation rather than a short-term occupation, the
 22 powers of the occupying power are more extensive.
 23 We have filed a request for a de novo hearing before
 24 a wider tribunal. And the -- the deputy chief justice
 25 decided that there is no room for a wider tribunal

1 and that all these assertions were made as an obiter
 2 dictum, so they're not binding.
 3 Q. Are you a member of something called the
 4 Israel Action Committee for Palestinian Prisoners and
 5 Detainees?
 6 A. No, I'm not.
 7 Q. You are their legal advisor?
 8 A. No.
 9 Q. Do you know that organization?
 10 A. I'm trying to translate word by word to
 11 Hebrew. And what I think you're referring to is --
 12 is a group that asked me once or twice to represent
 13 Palestinian detainees -- detainees in parole boards.
 14 And if you're -- if I'm right about which body it is,
 15 it no longer exists. But I'm -- but I'm not sure.
 16 Q. I read a quotation from you in the Jerusalem
 17 Post, talking about the relationship between the PA
 18 and the Israeli government. And I'll -- I'll read it,
 19 and you tell me if it's --
 20 A. Accurate.
 21 Q. -- if it -- if you said it. And then I'll
 22 ask you --
 23 A. Okay.
 24 Q. Or if you remember it. That's maybe a fairer
 25 question. So I'll read it to you, and then you just

1 tell me if you remember it.
 2 "Sfard charged that this was a case of cops
 3 and robbers joining forces, a situation of countries
 4 that are controlled by organized crime or the mafia."
 5 A. I do not recall this. If it reminds me
 6 anything, then it has to do with the relationship
 7 between settlers and the government rather than the
 8 PA and the government of Israel.
 9 Q. Do you --
 10 A. Can you read me the context?
 11 Q. You know, I'll -- I'm going to come -- see
 12 if I can find it.
 13 A. Okay.
 14 Q. Bear with me one second.
 15 Indeed I -- rather than read you the context,
 16 I'm going to mark a copy of it and provide it to you.
 17 MR. YALOWITZ: Do you know what number this
 18 is?
 19 MS. WEISER: 112.
 20 MR. YALOWITZ: So this will be 112.
 21 (Plaintiffs' Exhibit 112 marked.)
 22 THE WITNESS: Can you refer -- can you refer
 23 me to the --
 24 Q. BY MR. YALOWITZ: Let's look. So it looks
 25 like it's about six or eight lines down. It seems to

1 involve the Migron outpost.
 2 A. (Examining.) Yes. So I now read the context.
 3 And indeed the context is that I said that the
 4 government or the authorities -- the Israeli authorities
 5 in the West Bank are joining forces with the settlers of
 6 Migron, who robbed Palestinians of their land. So that
 7 was my remark.
 8 Q. What did you mean when you referred to the
 9 "mafia"?
 10 A. I meant -- a mafia is a situation in which
 11 elements of crime infiltrate the authorities. And
 12 much of the outpost phenomena in the West Bank is
 13 based on the cooperation between the settlers and
 14 public officials who are very sympathetic to the --
 15 ideologically to the settler -- settlement movement.
 16 Q. Do you know much about the mafia?
 17 A. No.
 18 Q. Have you ever heard of something called
 19 "Cosa Nostra"?
 20 A. In movies I have.
 21 Q. What is "Cosa Nostra"?
 22 A. Our -- "our cause." "Our joint cause."
 23 Isn't it? In -- in Italian.
 24 Q. In Italian, I've heard it means "our thing."
 25 A. "Our thing." Okay.

1 Q. Do you know what a "don" is?
 2 A. No. Aah, "don," like a "chief."
 3 Q. Do -- do you know what the "capo di tutti
 4 capi" is?
 5 A. I'll -- I'll make it short for you. My
 6 knowledge of mafia is from the stepfather and -- and
 7 the like.
 8 Q. "The Godfather"?
 9 A. "The Godfather," not the stepfather. "The
 10 Godfather," of course.
 11 Q. Okay. That's all right. That's all right.
 12 So, like, have you ever heard of John Gotti?
 13 Do you know who that is?
 14 A. I heard the name. I remember it has something
 15 to do with the mafia. But I don't know.
 16 Q. Okay. You -- you have -- can you estimate,
 17 in your career, how many cases you've brought before
 18 the High Court of Justice?
 19 A. Three figures.
 20 Q. And would it be fair to say that those cases
 21 have -- well, let me ask a different question.
 22 What proportion of those cases would you
 23 identify as having an association with causes on the
 24 left?
 25 A. Define "left."

1 Q. Sure. Do you -- do you have an -- well, do
 2 you think of -- is there a left in Israel, a political
 3 left?
 4 A. A very small one.
 5 Q. And would you -- would you consider yourself
 6 part of it?
 7 A. I would.
 8 Q. And, I mean, you're not embarrassed about
 9 that; right?
 10 A. Absolutely. I'm very proud. Absolutely not.
 11 Q. You're absolutely proud?
 12 A. Absolutely proud.
 13 Q. And what proportion of the cases you've
 14 brought to the High Court of Justice would you estimate
 15 are associated with causes on the left?
 16 A. Look, I understand that looking at a human
 17 rights case which benefits, if one, Palestinians, can
 18 be seen as a case that is brought with an aim to --
 19 to advance a leftist agenda. But I don't see it that
 20 way. 90 percent of my cases are pure human rights
 21 cases. It is very saddening if we would define here
 22 that promoting human rights, defending human rights
 23 is only a left -- leftist thing. But as far as this
 24 is the agreement here, so that's my answer.
 25 Q. I -- I certainly didn't mean to suggest that

1 human rights were a left-wing or a right-wing cause.
 2 I -- this isn't the forum, but you -- you might be
 3 surprised if we had a conversation about it.
 4 And I -- I understand that you've, for
 5 example, represented officers of the GSS.
 6 Isn't that right?
 7 A. I have.
 8 Q. And so I'm not -- I really wasn't -- wasn't
 9 asking in order to confront you. I was asking more
 10 just to get a sense of the -- the mix of your works.
 11 MR. HILL: We'll wait for a question.
 12 Q. BY MR. YALOWITZ: So -- so let me just ask
 13 it this way.
 14 Of the several hundred cases you've done,
 15 what proportion would you say people in the public
 16 in Israel would identify as -- as a left-wing cause?
 17 A. The vast majority.
 18 Q. And would it be fair to say that, in those
 19 cases, you are speaking truth to power?
 20 A. I hope I do.
 21 Q. That's --
 22 A. That's what I mean to do.
 23 Q. That's your aim?
 24 A. That's my aim.
 25 Q. Now, does the High Court of Justice have

1 jurisdiction over cases in which a person who feels
 2 he or she has been wrongly convicted could bring a
 3 claim of actual innocence?
 4 A. The High Court of Justice is not a court
 5 of appeals. It's a first instance that has jurisdiction
 6 against actions -- for judicial review of actions made
 7 by the branches of government.
 8 It is possible -- it is very, very, very
 9 narrowly possible to file a High Court petition against
 10 a court of law. So, theoretically, it's possible to
 11 bring a case against the district -- against -- well,
 12 the District Court has an appeal procedure to the --
 13 to the Supreme Court. But let -- let's say against
 14 the Military Court of Appeals.
 15 But then the -- the only basis for such
 16 a petition would be a procedural flow, not that the
 17 court was -- has erred. This is not a valid basis
 18 for petition.
 19 Q. So suppose an individual were convicted of
 20 a heinous rape and murder and were imprisoned. And
 21 later -- the trial was complete, and all the appeals
 22 were exhausted. And years later, DNA evidence was
 23 developed, and it -- it really showed that the person
 24 was innocent and, indeed, the -- the person whose DNA
 25 matched actually admitted that he was the perpetrator.

1 What would -- how would you get such a person
 2 out of jail, the -- the wrongly convicted person?

3 A. In the Israeli civilian system, there is
 4 a procedure for asking for a de novo trial, basing
 5 on the claim that there was a miscarriage of justice.
 6 And the chief justice of the Supreme Court or another
 7 justice that was delegated that power from the chief
 8 justice -- by the chief justice has the power to
 9 instruct a new trial.

10 Q. And -- and suppose there was nothing wrong
 11 with the first trial. The first trial -- I mean,
 12 there's process and there's --

13 A. Yeah.

14 Q. -- innocence; right?

15 So even if there's nothing wrong with the
 16 first trial, there must be some mechanism by which
 17 an innocent person can be released?

18 A. That was the -- that was the procedure I
 19 discussed.

20 Q. I see.

21 A. There's --

22 Q. So it doesn't -- the procedures don't matter.
 23 It's actual innocence that matters?

24 A. It's miscarriage of justice.

25 Q. Now, does -- does a significant part of your

1 work deal with international norms of due process?

2 A. While I was --

3 Q. By the way, would you like some water? I'm
 4 going to get some.

5 A. I'm fine. Thanks.

6 While I was working on the Yesh Din report,
 7 I've done an extensive research on due process rights.
 8 And now and then the issue comes up.

9 Q. Have you done any work on American norms
 10 of due process?

11 A. No.

12 Q. And in your expert report, you don't offer
 13 any opinions about American norms of due process;
 14 correct?

15 A. I wouldn't offer opinions on things that
 16 I'm not an expert on.

17 Q. And you're not an expert on American norms
 18 of due process?

19 A. I'm not an expert.

20 Q. So have we marked your report?

21 MS. WEISER: Yeah.

22 MR. HILL: I don't think so.

23 MR. YALOWITZ: I think we have not.

24 MS. WEISER: I thought we marked it as 111.

25 MR. YALOWITZ: We were -- we were going to,

1 but --

2 MS. WEISER: Aah. Okay. Well, it is 111.

3 MR. YALOWITZ: Okay. So why don't we mark
 4 a copy of your report as 111. And I'll pause so that
 5 we can do that.

6 (Plaintiffs' Exhibit 111 marked.)

7 Q. BY MR. YALOWITZ: Mr. Sfard, Brenda has
 8 marked a copy of your report as Plaintiffs' 111.

9 Would you just take a moment and confirm
 10 that it's the same as the one you have before you?
 11 And I'm very happy for you to work with the one before
 12 you because I know it has some flags that -- that you've
 13 prepared so that you can refer to things.

14 A. (Examining.) This is my report but without
 15 the annexes.

16 Q. So would you look with me on page 23? I'm
 17 looking at paragraph 67.

18 Do you have it before you?

19 A. Yes.

20 Q. Paragraph 67 describes the basis for your
 21 opinions on due process in the Israeli -- in the --
 22 well, Israeli military courts in general?

23 Is that fair to say?

24 A. Yes.

25 Q. And it -- it appears to cite four items --

1 A. Uh-huh.

2 Q. -- is that right?

3 A. Yes, it is.

4 Q. Personal experience is the first; correct?

5 A. Correct.

6 Q. Previous studies is the next; right?

7 A. That's right.

8 Q. The third is conversations with lawyers?

9 A. That's right.

10 Q. And the fourth is the Yesh Din report?

11 A. That's correct.

12 Q. Okay. Have -- have we already talked about
 13 your personal experience?

14 A. Are you asking me if we talked about it?

15 Q. Yeah. So -- so that was a bad question. Let
 16 me ask a different question.

17 Your own experience that formed the basis for
 18 your opinions about due process in the Israeli military
 19 courts, have you described that to me already?

20 A. I think I have. I will add to that that

21 I have appeared in many detention hearings. I've
 22 spent long days in the military courts for many --
 23 for reasons other than criminal cases, as I mentioned
 24 before. And in these instances, I've also come across
 25 and audited hearings. So -- but that's fairly my

1 experience.

2 Q. So, by the way, you've mentioned something
3 called detention hearings?

4 A. Right.

5 Q. That involves a thing called administrative
6 detention; is that right?

7 A. No. I meant extension of pre-trial detention.

8 Q. I see. So this is like whether -- whether
9 the person should be released pending trial?

10 A. Well, it also means that. But I mainly meant,
11 while investigation is ongoing and indictment was not
12 filed yet, for the sake of the investigation, there
13 is a need for the suspect to either remain in custody
14 or not.

15 Q. Do they call that administrative detention?

16 A. No. Administrative detention is a specific,
17 special feature of the military commander's power, in
18 the occupied West Bank, to hold people in detention
19 without indictment as a preemptive measure for them
20 not to engage in hostile activities. And there is a
21 judicial review in -- in such matters.

22 Q. Are there other countries in the international
23 community that have that form of administrative
24 detention?

25 A. Administrative detention is a power provided

1 in the Fourth Geneva Convention. So, in -- in theory,
2 countries who are in a situation where they occupy
3 territory, the military commander of the occupying
4 force has the power to detainee people administratively.

5 Q. I read that there were complaints that the
6 PA was detaining Palestinians administratively for
7 long periods of time without trial.

8 Is that also a practice that goes on in --
9 in countries that are not occupying?

10 A. I don't know Palestinian law. And I don't
11 know if that happens. But administrative detention
12 is something that, I guess, other countries engage in.
13 I don't know what's the -- the normative source for
14 that.

15 Q. So you also mentioned, in paragraph 67,
16 previous studies?

17 A. Uh-huh.

18 Q. Which -- which ones were you basing your
19 opinion on?

20 A. Well, there was a study made by B'Tselem
21 at the end of the '90s. There was -- I think it's
22 mentioned in the Yesh Din report. There was a study
23 made -- I don't recall the name. A Palestinian author
24 made a study on military courts. Again, I don't recall
25 the -- the citation. But, sadly enough, there -- there

1 was very little studies made on the military courts
2 prior to the Yesh Din report.

3 Q. What was the name of the B'Tselem report?
4 A. I will check -- I will -- if you want, I
5 can -- we can stop, and I'll check in the Yesh Din
6 report because it is cited.

7 Q. It's cited in the --

8 A. Yes, it is.

9 Q. -- Yesh Din report?

10 And did you -- did you read it in preparation
11 for your --

12 A. No.

13 Q. -- opinion today?

14 It's just something that was in the -- the
15 background --

16 A. That's right.

17 Q. -- of your experience?

18 A. That's right.

19 Q. And since the Yesh Din report, have there
20 been subsequent reports by non-government organizations?

21 A. I -- I know that there were several -- I don't
22 know if to call it reports -- but statements made by
23 Amnesty International and I think also Human Rights
24 Watch and U.N. organs like the Human Rights Committee
25 or the -- yeah, I think the Human Rights Committee

1 of the U.N. -- regarding due process rights in the
2 military courts. But I don't think there was any
3 extensive research done.

4 Q. You've mentioned conversations with lawyers?

5 A. Yeah.

6 Q. Did you undertake particular conversations
7 for this report, or were you more referring to the
8 fact that you're in the legal community and you --

9 A. Both.

10 Q. So who did you speak to in preparation for
11 the report that we're here about today?

12 A. Aah, sorry. For the report here? No,
13 I didn't discuss with anyone for the report today,
14 because the report deals with a time frame that is
15 not -- that is not now.

16 But in preparation of writing or editing
17 the Yesh Din report and also as a member of this legal
18 community, I had dozens of discussions with friends
19 and colleagues who are attorneys and prosecutors in
20 the military courts.

21 Q. So did -- did you speak with any of the
22 defense lawyers in the 21 cases that were the subject
23 of Mr. Kaufman's report?

24 A. I have not.

25 Q. Did you speak with any of the prosecutors

1 who prosecuted any of those 21 cases?
 2 A. I don't -- I did not.
 3 Q. Did you speak with any of the judges who
 4 sat in judgment on any of those 21 cases?
 5 A. Of course I did not.
 6 Q. And did you speak with any judges at the
 7 Military Court of Appeals about any of those 21 cases?
 8 A. No.
 9 Q. In connection with the Yesh Din report, did
 10 you or any of your colleagues speak with any of the
 11 defense attorneys in the 21 cases?
 12 A. I don't know if -- there were many defense
 13 lawyers that were interviewed for -- to form the basis
 14 for the report. And I'm not sure if any of them, by
 15 chance, was also a defense attorney in any of the 21
 16 files.
 17 Q. Is -- is there a way to find that out?
 18 A. I'm -- I suppose there is.
 19 Q. How would we do that?
 20 A. I will have to do that after our deposition,
 21 looking at the list of -- if there is one with Yesh
 22 Din still. There -- there are names of defense
 23 attorneys that are listed in the report. They are --
 24 they are quoted in the report. I don't think that
 25 any of them is mentioned in any of the 21 files.

1 Q. And -- and do you know whether anybody from
 2 Yesh Din, in connection with the Yesh Din report, spoke
 3 with any of the prosecutors in the 21 cases --
 4 A. I don't know.
 5 Q. -- we're dealing with?
 6 And do you know whether any of the people
 7 from Yesh Din, who participated in the preparation of
 8 the Yesh Din report, spoke with any of the judges on
 9 the 21 cases?
 10 A. No.
 11 Q. "No" meaning you don't know or --
 12 A. "No" meaning I don't think they have.
 13 Q. Now, do you believe that any of the previous
 14 studies or subsequent -- well, let me break it up.
 15 Do you think that any of the 21 cases were
 16 the subject of the B'Tselem report that you referred to
 17 earlier?
 18 A. I don't think so.
 19 Q. And do you think that any of the 21 cases
 20 were the subject of any reporting or comment by Amnesty
 21 International?
 22 A. I don't think those comments or reporting
 23 dealt with specific cases.
 24 Q. And there -- there's an organ -- there's
 25 an organ of the United Nations that deals with torture,

1 cruel, inhuman, and degrading --
 2 A. CAT.
 3 Q. -- treatment.
 4 What's that called?
 5 A. CAT.
 6 Q. C-A-T?
 7 A. Committee Against Torture, CAT.
 8 Q. U.N. CAT?
 9 A. Yeah.
 10 Q. Israel is a signatory to that convention;
 11 is that right?
 12 A. It is.
 13 Q. And as part of its membership in that
 14 convention, it's required to submit a periodic report?
 15 A. Yes, it is.
 16 Q. That report is a publicly available document;
 17 right?
 18 A. I think it is.
 19 Q. And have any of the CAT reports mentioned
 20 any allegations of cruel, inhuman, or degrading
 21 treatment or torture in any of your 21 cases?
 22 A. The CAT's concluding observations as to
 23 Israel every year alleges that Israel is engaging in
 24 abusive means of interrogation. It is not indicating
 25 specific cases.

1 Q. Are the -- the conclusions of CAT are based
 2 on self-reporting by Israel; is that right?
 3 A. Yes. And with shadow reports by Israeli
 4 human rights organizations.
 5 Q. And are the -- are the names of the cases
 6 that Israel self-reports, are those publicly available?
 7 A. Sorry. Could you clarify?
 8 Q. Sure. So in -- in its -- I don't think
 9 these are annual reports. I think they're every few
 10 years --
 11 A. That's right.
 12 Q. -- is that right?
 13 A. Yeah.
 14 Q. And so in -- in its periodic report, Israel
 15 will report the number of allegations of cruel, inhuman,
 16 or degrading treatment or torture that have come to
 17 the attention of certain internal investigatory bodies
 18 in Israel; right?
 19 A. I don't think that the -- the periodic report,
 20 at least one that I saw and read, has a -- a number of
 21 allegations made. I think it includes only the number
 22 of cases in which disciplinary measures were taken.
 23 But this is from what I remember.
 24 Q. We could check --
 25 A. Yeah. I think that --

1 Q. -- and then we would know.
 2 A. I think CAT --
 3 Q. Do you agree with me?
 4 A. That if we'll check, we'll know? I agree.
 5 Q. Okay. So we don't need to speculate.
 6 A. Sure.
 7 Q. Now -- now, on -- I want to ask you about
 8 page 8 of your report. And I'm -- I'm focused on
 9 paragraph 1.
 10 Do you have it before you?
 11 A. Yes.
 12 Q. You -- you write, in paragraph 1, that you
 13 are:
 14 "Familiar with the legal framework and the
 15 actual practice of security investigations into alleged
 16 security related offenses in Israel during the relevant
 17 time frame."
 18 A. Yes.
 19 Q. Have you described earlier the basis for your
 20 familiarity?
 21 A. No. You mean when I said that, as a
 22 journalist, I knew about GSS files? No.
 23 Q. No, no. I'm -- I'm -- well, let me do it
 24 this way, then. I --
 25 A. Okay.

1 Q. I'm not trying to --
 2 A. No, no. Okay. So the answer is "no."
 3 Q. Okay. Please go ahead.
 4 A. My familiarity stems from my work in this
 5 field of being a defense lawyer for defendants accused
 6 in security related crimes. Most of the cases that
 7 I've conducted or been involved in were in Israeli
 8 civilian courts. But some of them were in the military
 9 courts. In all of them, I have been given, demanded,
 10 and provided the GSS files. And so it is a very --
 11 I'm acquainted with this subject matter.
 12 Q. Is it fair to say that you've read hundreds
 13 of GSS files?
 14 A. I would say that, yeah.
 15 Q. And --
 16 A. Maybe hundreds is -- is an exaggeration.
 17 Q. Many?
 18 A. But many.
 19 Q. And have you relied on them in your work?
 20 A. This is the basis for cross-examination.
 21 This is the basis for understanding what happened in --
 22 in the investigation.
 23 Q. Have you found them to be reliable statements
 24 of what happened?
 25 A. Not always.

1 Q. Depends on the particular case?
 2 A. Depends on the particular case. Depends on
 3 the particular interrogator. I found them to be very,
 4 very important for a defense attorney because they
 5 provide some peek to what happened in the investigation
 6 room for many weeks.
 7 Q. So in addition to your human rights work in
 8 which you've read GSS -- we're using "GSS." Apparently
 9 yesterday we were told really "ISA" is a better English?
 10 A. ISA.
 11 Q. So I'm afraid we're going to find ourselves
 12 using both.
 13 Which do you call them?
 14 A. I call them GSS. But I could call them ISA.
 15 I can call them Shabak.
 16 Q. We can use the convention you used in your
 17 report. That might be --
 18 A. Okay.
 19 Q. -- the easiest. But, anyway, it's the same
 20 thing?
 21 A. Right.
 22 Q. In addition to what you just described, which
 23 is your human rights work in which you read -- you have
 24 read many GSS files, could you describe what additional
 25 familiarity you have with --

1 A. Just to correct, I -- I did not say that
 2 this -- that I read GSS files as a -- in the framework
 3 of my practice in human rights, but as a defense --
 4 criminal defense attorney.
 5 Additionally, I am involved in -- in human
 6 rights work that includes working on behalf of and
 7 consulting many Israeli human rights organizations.
 8 Some of them, like the Public Committee Against Torture
 9 in Israel, has work that has to do with the GSS. So
 10 in that -- that is another source of my knowledge and
 11 understanding of the GSS work.
 12 Q. Do you -- do you feel that -- well, first
 13 of all, thank you for that clarification.
 14 Is there other work that you would draw
 15 on that you would include in your familiarity with
 16 the legal framework and actual practice of security
 17 investigations as described in the first paragraph
 18 of your report?
 19 A. No. I think that is the main thing. I am --
 20 in my practice, this area of law is of interest to me,
 21 and I am trying to keep updated.
 22 Q. Do you -- do you believe that the practice
 23 of GSS investigations has changed since 1999?
 24 A. I believe it has.
 25 Q. Because of the Supreme Court opinion?

1 A. Yes.
 2 Q. Describe how you believe it's changed.
 3 A. Well, I think, prior to 1999, there was almost
 4 no Palestinian that didn't go through investigation in
 5 the GSS that was not subjected to abusive interrogation
 6 techniques, by the thousands, tens of thousands. And
 7 I think that the number has dropped significantly.

8 That is not to say that -- that there are
 9 no more investigations with abusive techniques employed
 10 against the suspects. The more the allegation or the
 11 suspicion is serious, the higher the risk or the chances
 12 that the GSS has used physical means in interrogation.

13 Q. And these are means that are described in
 14 the -- the PCATI? Is that -- is that an acronym that
 15 we use? Or do you say -- how do you say the name of
 16 the case?

17 A. We say it in Hebrew. But PCATI is when we
 18 say it in English.

19 Q. So are you describing the physical techniques
 20 that are described in the PCATI opinion?

21 A. Yes, in the PCATI opinion. Also, there were
 22 allegations of mental abuse, threatening -- I mean,
 23 when I say there were allegations, I mean that there
 24 was a pattern of allegations. One person alleges
 25 something, that is one thing. But when there is a

1 pattern, then as -- that -- that shows something. So
 2 there's a pattern of allegations that GSS interrogators
 3 threat [sic] suspects of incarcerating their family
 4 members and things of that sort. So I said physical
 5 means, but also mental abuses.

6 Q. Were those also forbidden by the High Court
 7 of Justice?

8 A. The High Court of Justice case --

9 Q. Let me rephrase the question. Because I don't
 10 want to -- I want to ask a question that you think is
 11 fair. And I apologize for interrupting. But I don't
 12 want to sort of debate the legalities of it.

13 A. No, no.

14 Q. So as I recall it -- and I'm sure you know
 15 it much better than I do. But as I recall that case,
 16 the High Court of Justice described certain physical
 17 techniques like the Shabak position and the frog crunch;
 18 is that right?

19 A. That's right. There were five techniques
 20 that were dealt with in this case.

21 Q. And they said that -- they said in, I think,
 22 fairly strong language that those techniques are not
 23 authorized under Israeli law?

24 A. Unless there is necessity.

25 Q. And I think what they said -- and maybe it's

1 a nuance that would be lost on some people. But I think
 2 what they said is they are not authorized, but we're --
 3 we understand that, if a interrogator is criminally
 4 prosecuted, he could raise a necessity defense which
 5 would be evaluated on the facts and circumstances.

6 Is -- is that -- do I have that right, or
 7 do you disagree with my reading of it?

8 A. I think your reading of it is accurate. And
 9 I would hope that the government of Israel would read
 10 this case just like you did.

11 Unfortunately, from what we see in the years
 12 after the case was rendered, the decision was rendered,
 13 we see that instead of not -- instead of allowing the --
 14 or sorry -- subjecting the GSS interrogator to a
 15 criminal trial and then -- where he could raise the
 16 necessity defense, it is the practice that those GSS
 17 investigators receive a prior permit or consent that,
 18 in this specific scenario, this is necessity.

19 And this, I think, is exactly what the Supreme
 20 Court was not planning when they gave the ruling, the
 21 judges.

22 Q. And then do I have it right that -- well,
 23 anyway, we -- we seem to have cases with the necessity
 24 exception as well in the United States like the Boston
 25 bomber case.

1 Did you read about that case?

2 A. No.

3 Q. Anyway, okay. So -- so you mentioned a moment
 4 ago that a -- an isolated allegation you thought was
 5 different from a pattern.

6 Could you just explain what you meant by that?

7 A. There is a force in a pattern of allegations
 8 because it shows that there is a repeating occurrence
 9 of such an -- such a practice. It shows a practice
 10 rather than an isolated event.

11 Q. Thank you. That's helpful.

12 Do you -- one thing I wanted to ask you before
 13 about your experience that I forgot to was about plea
 14 bargaining.

15 Does plea bargaining take place in the Israeli
 16 civilian courts?

17 A. Yes, it is -- it does.

18 Q. And do you participate in that?

19 A. When I was -- when I was a defense lawyer in
 20 the main part of my practice, I have.

21 Q. And did you participate in any plea bargain
 22 negotiations in the military court system?

23 A. Yes, I have.

24 Q. Can you give me an estimate of how many in
 25 your career you've participated in?

1 A. Again, difficult for me to say.
 2 Most of them were plea bargain negotiations
 3 that were led by Mr. Feldman. I remember at least one
 4 case that I negotiated a plea bargain. And, eventually,
 5 the case ended with a plea bargain.
 6 Q. The other thing that I wanted to ask you about
 7 Mr. Feldman, did -- did you learn from him matters of
 8 what we might call the art of being a lawyer, strategic
 9 judgments and things like that?

10 A. I think all I know I learned from him and
 11 not only law.

12 Q. And part of being a good lawyer is making
 13 judgments about strategy?

14 A. Would you agree with that?

15 A. This is fundamental.

16 Q. So -- and would you agree that -- that, for
 17 many excellent lawyers, their strategy is not always
 18 obvious until it's been executed?

19 A. I agree. But I then want to make one
 20 comment about it. Strategy should not be tailored
 21 until you have all the information about the case.
 22 Only then you can tailor a strategy. And I agree
 23 that a good strategist might form a strategy that
 24 you don't understand without the in or outs of the --
 25 of the case.

1 Q. Are you familiar with the good goat joke?
 2 A. The good goat?

3 Q. Yes.

4 A. No. I'm -- I'm familiar with the rabbi and
 5 the goat, but not --

6 Q. We'll exchange them at break.

7 A. At the break.

8 Q. Perhaps that would be more appropriate.

9 Now, the Yesh Din report has a number of
 10 statistics in it?

11 A. Right.

12 Q. And then I think there was some criticism
 13 of some of those statistics by the --

14 A. By the organ that was criticized.

15 Q. -- by the military courts and by the
 16 prosecutors; right?

17 A. Right.

18 Q. And then the Yesh Din published a response
 19 to those criticisms; right?

20 A. Right.

21 Q. And have I exhausted the public debate about
 22 the Yesh Din report?

23 A. I don't know. It's your call.

24 Q. No, I mean are there other -- that was sort
 25 of a flip question.

1 A. Are there other documents?
 2 A. Well, later on, I discovered something that
 3 was not -- that I was not aware of when we formed our
 4 response to the criticism of the figures. The main
 5 criticism that was presented dealt with comparison
 6 to figures in the Israeli civilian system. So we
 7 wrote in the report that .29 percent of cases in the
 8 military court system end up with full acquittal. And
 9 the response was: Well, in Israel it's 0.1 percent.

10 We've double-checked ourselves later on, and
 11 we found out that the Israeli figures do not include
 12 cases that were -- that ended without a ruling, meaning
 13 that the prosecution has canceled, annulled the
 14 indictment or, for any other reason, backed it off.

15 And, for example, in 2010, there were
 16 29 percent of cases in the Magistrate's and District
 17 Courts that ended up like that. So the equivalent
 18 figure in the military courts at the year that we've
 19 checked, 2006, was, I think, 2.9. So 2.9 percent of
 20 cases were annulled by the prosecution probably because
 21 of not enough evidence or so. So the difference is
 22 almost 30 percent.

23 Q. Why would they annul a prosecution if there
 24 wasn't enough evidence? Couldn't they just stand on
 25 the charge itself?

1 A. I -- I honestly do not know what comprised
 2 of those 2.9 percent or those 29 percent. All I know
 3 is that the chance -- if you're indicted in the civilian
 4 courts or in the military courts, if you're indicted,
 5 what is your blanket chance of stepping out of the
 6 court without any conviction. That's the question
 7 that we've asked. And -- and when you ask me whether
 8 there's anything to add to this exchange that was very
 9 fierce, this is the only thing that I have to add.

10 Q. It was a lively exchange? Would you agree
 11 with that?

12 A. The previous president of the military courts,
 13 Shaul Gordon, said in a -- in a -- in a panel with me
 14 that humanitarian law should govern the relationship
 15 between Yesh Din and the military courts.

16 Q. He was joking?

17 A. Of course.

18 Q. So -- so if the prosecution in the military
 19 courts -- I just want to follow up on that.

20 A. Yeah.

21 Q. If the prosecution in the military courts
 22 makes a charge and then doesn't have sufficient
 23 evidence --

24 A. Let's say a prosecution witness disappeared
 25 or --

1 Q. -- could -- could they -- could they get
 2 a conviction simply on the bear allegations of the
 3 indictment?

4 A. On the bear allegation of the indictment? No.
 5 But they could try to admit the out-of-court statements
 6 of the -- of the witness that is not available. And
 7 in some cases, in some conditions are met -- if some
 8 conditions are met, it is possible. But -- but if other
 9 things happen or if, for any other reason, they decide
 10 not to continue the prosecution, they can annul it at
 11 any stage.

12 Q. So just -- just so I have it clear, though,
 13 on the -- on the hypothetical, if you will, where the
 14 prosecution brings a -- a fair indictment and offers
 15 no evidence, would that result in a conviction or
 16 acquittal?

17 A. Where they bring no evidence?

18 Q. Yeah.

19 A. I would expect it to end in an acquittal.

20 Q. Okay. And do you have any rate -- do you
 21 have any information on the rate of plea bargaining
 22 in what we've been calling serious security offenses?

23 A. There is no study of that at all. The only
 24 thing we do have is a comment made by the Deputy MAG,
 25 the -- one of the previous Deputy MAGs at the Israeli

1 Q. BY MR. YALOWITZ: During the break,
 2 Mr. Sfard, we've marked as Plaintiffs' 113 a
 3 newspaper article describing a spirited debate
 4 that you had with a lawyer named Roy Schoyndorf.

5 A. (Examining.) Yeah.

6 Q. And have you had a chance to read that, or
 7 do you want a moment?

8 A. I remember this.

9 Q. The newspaper article reports that you opened
 10 your remarks:

11 "By accusing Israel of having an investigative
 12 apparatus that is a 'soulless scarecrow,' in which
 13 indictments were only filed in 2.5 percent of 1,939
 14 complaints submitted to the IDF in recent years."

15 Do you see where the newspaper article says
 16 that?

17 A. Yeah, I can see that. Of course -- of course
 18 this is not accurate.

19 Q. I was --

20 MR. HILL: Kent, just --

21 Q. BY MR. YALOWITZ: I was --

22 MR. HILL: I'm sorry.

23 Q. BY MR. YALOWITZ: I was going to ask you --
 24 MR. HILL: Sorry to interrupt. I think I've
 25 got the wrong document.

1 Bar Association meeting or panel, in which he said --
 2 said that, in the military courts, 95 percent of cases
 3 end up in plea bargaining. But this was, I think, not
 4 a -- a scientific figure. He just said what he thought
 5 it was, the correct figure.

6 Q. More of an estimate?

7 A. Estimate. That's the word I was looking for.

8 Q. Based on his experience?

9 A. Yes.

10 Q. Do you think it's a reliable estimate?

11 A. It seems to me fair.

12 Q. Do you -- do you have any information on what
 13 the rate of plea bargaining is in the civilian courts
 14 in Israel?

15 A. No, I don't.

16 Q. Do you want to continue, or do you want to
 17 take a short break?

18 A. It's your call. I'm at your disposal.

19 Q. I'm happy to continue unless --

20 MR. YALOWITZ: Well, Brenda, what do you
 21 think?

22 MR. HILL: I'll take a break.

23 MR. YALOWITZ: Okay.

24 (Recess from 10:22 a.m. to 10:32 a.m.)

25 (Plaintiffs' Exhibit 113 marked.)

1 MR. YALOWITZ: Oh, so sorry. That's the next
 2 one. You can hold on to it.
 3 MR. HILL: Thank you.
 4 MR. YALOWITZ: You just have to cross the
 5 number out. Do you want a moment to -- is that --
 6 does that say "Top lawyers debate"?

7 MR. HILL: (Indicating.)

8 MR. YALOWITZ: Yeah, that's it. Okay.

9 I apologize. Mr. Hill, do you want a moment to --

10 MR. HILL: Just give me a --

11 MR. YALOWITZ: -- catch up?

12 MR. HILL: Give me one moment to read it.

13 MR. YALOWITZ: Just let me know when you're
 14 ready.

15 MR. HILL: Thank you.

16 Q. BY MR. YALOWITZ: So my first question was
 17 just: Did you see that comment?

18 And I think the answer is "yes"?

19 A. Yeah.

20 Q. And then my next question was going to be:
 21 Did it -- did the newspaper article quote you fairly?

22 A. Now -- now -- now that I had a moment,

23 I can understand the context. And barring that

24 I don't remember the exact figures, I suppose that

25 I read them from a paper or some -- some thing. It

1 seems like a fair representation of what I said. But
 2 I don't remember the exact figures.

3 Q. What -- what --

4 A. So I cannot verify them.

5 Q. Sure. I didn't understand the comment
 6 "soulless scarecrow."

7 What does that mean?

8 A. That means that -- well, I -- we're
 9 discussing here -- I'm discussing here the operation
 10 of the law enforcement agencies that are responsible
 11 for investigating allegations that Israeli soldiers
 12 and officers have wronged Palestinians in the West
 13 Bank, which means mainly the military police central
 14 investigating unit.

15 And what I'm -- the -- the metaphor of a
 16 "soulless scarecrow" is trying to say that there is
 17 an apparatus and there is -- there are authorities
 18 that are investigators, there is a police station,
 19 but it's soulless. It's without -- it's not really
 20 doing anything significant and doesn't supply the
 21 protection that it should to Palestinians.

22 Q. Did you mean it literally as a comment on
 23 the souls of the people who were in that service, or
 24 was it a metaphor to draw people's attention to the
 25 issue?

1 A. I definitely did not say anything about
 2 the people in the service. I meant that the -- that
 3 the system, as a system, is there in its -- like a
 4 scarecrow. It doesn't really operate. It's just
 5 there as a skeleton.

6 Q. Okay. And the figures, those are not figures
 7 involving investigations by the GSS? Those are figures
 8 involving IDF incidents?

9 A. That's right.

10 Q. Okay. Thank you.

11 So let's -- let's look at what we'll mark as
 12 one --

13 MS. WEISER: 114.

14 MR. YALOWITZ: -- 114. And is it one page
 15 or two pages?

16 MS. WEISER: It's one page.

17 MR. YALOWITZ: It looks like I gave Brian
 18 a second page.

19 MS. WEISER: Let me see what that one is.

20 THE WITNESS: Can I add something?

21 Q. BY MR. YALOWITZ: Please go ahead.

22 A. Just to say that I was basing my figures on
 23 a study -- an extensive study, also taken by Yesh Din,
 24 that was published, I think, a year ago on the work
 25 of the -- of the military police and military courts,

1 those courts that try soldiers, not the courts in the
 2 West Bank.

3 Q. Do the same procedures and rules apply to
 4 both court systems?

5 A. No.

6 Q. Okay. Thank you.

7 A. Can I see that?

8 Q. So yeah, we'll -- we'll mark as Plaintiffs'
 9 114 another article, and then Brenda will hand it to
 10 you.

11 A. Okay.

12 Q. You're free to look at Mr. Hill's copy in
 13 the meantime.

14 (Plaintiffs' Exhibit 114 marked.)

15 Q. BY MR. YALOWITZ: Let me know when you've
 16 had a chance to look at that story.

17 A. (Examining.) Yeah.

18 Q. This -- this is an article about a -- an
 19 oral argument you were giving or a hear -- de novo
 20 hearing that you were giving in the High Court of
 21 Justice; is that right?

22 A. It's an article that reports on -- yeah,
 23 I guess an oral hearing in the PCATI case, the second
 24 PCATI case, the one that dealt with targeted killings.

25 Q. So without getting too technical, if you

1 could explain maybe in words that somebody who doesn't
 2 have legal training would appreciate what your argument
 3 is regarding the topic at hand.

4 A. The question was whether -- in what
 5 circumstances is it permissible for an occupying
 6 power to use lethal force against civilians who are
 7 suspected of being involved in -- in terror attacks --
 8 in terror activity, not just attacks. That was the
 9 question.

10 Q. And was it your position that international
 11 humanitarian law provides that, when an enemy fighter
 12 is out of uniform and not carrying a weapon, that person
 13 is treated as a civilian under international law?

14 A. No.

15 Q. That may have been a bad question.

16 A. No, it was not a bad question. But it didn't
 17 reflect our argument -- my argument. My argument was
 18 that a combatant is a legitimate target always and a
 19 civilian is only a legitimate target during that window
 20 of opportunity, that very narrow time frame in which
 21 he directly engages in hostilities.

22 So targeting a combatant while he's asleep
 23 in his barracks is not a violation of international
 24 humanitarian law. Whereas, targeting a civilian
 25 while he's asleep, even if before he went to sleep

1 he has done some awful things, is not permissible
 2 under international law.

3 Q. Does international law forbid indiscriminate
 4 killing of civilians?

5 A. Of course.

6 Q. In all circumstances?

7 A. International law forbids targeting civilians.
 8 It also forbids injury and -- and killing of civilians
 9 as a -- as a side effect of targeting combatants
 10 according to the principle of proportionality.

11 Q. Is there a -- is there an exception in
 12 international law for targeting civilians -- let
 13 me ask the question again.

14 Does international law forbid targeting
 15 civilians for injury or death as a retaliatory measure?

16 A. Absolutely.

17 Q. Absolutely and unequivocally; right?

18 A. Absolutely, unequivocally. And I know what
 19 you're referring to. And absolutely yes.

20 Q. What I'm referring to is the crimes that
 21 we're here about in this case.

22 A. I agree that these are crimes.

23 Q. I thought you might.

24 All right. I -- I want to ask you now about
 25 matters of due process. And I want to distinguish

1 about the Israel military court of justice system.

2 A. Israeli --

3 Q. I said it wrong. The --

4 A. The Israeli military courts in -- in the --
 5 in the West Bank, Judea, and Samaria, whatever you
 6 want to call it.

7 Q. I think the neutral term seems to be the
 8 West Bank?

9 A. The West Bank. That's --

10 Q. We could --

11 A. That's how I call it.

12 Q. We could call it the liberated territories,
 13 but that might offend some.

14 A. OPT?

15 Q. That might offend some as well.

16 A. So West Bank.

17 Q. Okay. So in the military courts that we're
 18 discussing, the West Bank military courts, the accused
 19 may be defended by an advocate; is that correct?

20 A. That's correct.

21 Q. And does the accused have a right to a
 22 court-appointed attorney for a crime for which the
 23 sentence exceeds ten years?

24 A. Yes, he has.

25 Q. Now, in the military courts that we've been

1 among three things. So, first, I'm going to describe
 2 the three things that I want to distinguish about and
 3 ask you if you -- if you understand the difference
 4 among those three things.

5 So the first thing would be actual innocence.
 6 We've talked a little bit about that before. And I
 7 think you understand that, do you?

8 A. Yes, I think I do.

9 Q. And then the second thing I want to talk
 10 about would be what we might call minimum standards
 11 of due process required for civilized jurisprudence
 12 on a systemic level.

13 Do you have that in mind?

14 A. I have in mind minimum standards of due
 15 process according to international law.

16 Q. And -- and by that, I mean does the system
 17 provide that, as opposed to did an individual receive
 18 due process in a particular case.

19 A. I understand.

20 Q. And -- and then the third question -- the
 21 third topic that I want to cover with you in this set
 22 of three will be actual due process in actual cases.

23 A. Understood.

24 Q. Okay. Thank you.

25 So in the -- and I want to talk specifically

1 discussing, the same laws of evidence apply as the laws
 2 of evidence in the civilian courts; is that correct?

3 A. It is correct. There are some nuances.

4 Q. Would you describe the nuances?

5 A. I'll give you an example. In the relevant
 6 time frame, in the Israeli military courts, a very
 7 important judgment, ruling by the Israeli Supreme
 8 Court was not implemented. And that is what is called
 9 as the Kinsey judgment, which states that an accomplice
 10 cannot testify at a defendant's trial as a prosecution
 11 witness before his own trial is over so that he will
 12 not, you know, pass all the blame to the defendant.

13 That, for example, is the case in the --
 14 that was in the time frame the ruling -- the rule
 15 in Israeli courts and Israeli civilian courts. And
 16 it was not followed in the military courts, which
 17 caused problems, for example, in the Marwan Barghouti
 18 case. Because the -- the military prosecution was
 19 asked by the civilian prosecution to speed up the
 20 trials at the IMC because those accomplices could
 21 not testify against Marwan Barghouti in the Israeli
 22 courts.

23 Q. In the military court system, it -- is an
 24 accomplice -- well, let me ask a different question.
 25 Strike the last question.

1 In the civilian court system, is an accomplice
 2 allowed to testify after conviction or guilty plea,
 3 but before sentencing?

4 A. I don't recall if -- if the Kinsey -- if
 5 Kinsey was applied -- I think after the sentencing.

6 Q. So --

7 A. I think so. But this is, again, something
 8 we can check. But I think it's after sentencing.

9 Q. So if a system permitted a -- an accomplice
 10 to testify as a prosecution witness before sentencing,
 11 would it be your view that that rule deprived defendants
 12 of due process?

13 A. No.

14 Q. Coming back to the systemic topics we've
 15 been talking about, do I have it right that the
 16 military courts are typically open to the public?

17 A. I would not agree. And -- and I will --

18 Q. Please explain.

19 A. Yeah. When you say "open," the question
 20 is what -- what does it mean "open"?

21 A person from the public who wants to go to
 22 a military court cannot just knock on the door and get
 23 in. Absolutely not. Even a -- a journalist who wants
 24 to cover a hearing in the military court cannot just
 25 barge in. They need -- and, again, I'm referring to

1 the time frame that is -- that I refer to in my -- in
 2 my report. It might be that regulations have changed
 3 today, so I'm not sure about today, but back then.

4 The military courts are situated in a military
 5 base compound. In order to enter there, you need a
 6 kind of permit. You need to be authorized to enter.
 7 So, first of all, there was -- there is -- there was a
 8 member of the military court staff who was responsible
 9 for either allowing or prohibiting people from entering.
 10 And when we've interviewed this specific person for the
 11 Yesh Din report, we found out that his understanding
 12 of what are reasonable grounds for dismissing a request
 13 to enter are not our ideas of it. He thought that it
 14 was for his -- that he has a very wide discretion about
 15 this. That's one.

16 Two, family members. Family members of
 17 accused people could enter the -- the courthouse only
 18 for their family member's trial. And only two members
 19 of the family could enter. This not always has been
 20 kept, but that was the general rule.

21 And, third, I don't think of a system that
 22 is public if its judgments are not made public. And
 23 the judgment of the military -- judgments, rulings,
 24 decisions of the military courts, definitely of first
 25 instance, but most of the appeals instance as well,

1 have not been made public until this day.

2 Q. Okay. So let me try to break that down a
 3 little bit. Thank you for that --

4 A. My pleasure.

5 Q. -- that explanation.

6 First of all, with regard to journalists,
 7 do journalists have a right of access to the military
 8 courts?

9 A. In principle, yes. In theory, yes. In
 10 practice, as I said, they need to announce their
 11 arrival and discuss with the IDF spokesperson or the
 12 specific guy at the IMC unit that they're coming and
 13 they want to enter. A journalist that wants to go in
 14 eventually will get in. I'm not suggesting that --
 15 that the military courts are sealed. I'm saying that
 16 it is not in the standard of a public hearing as --
 17 as it should be.

18 Q. It's more restricted than a civilian court --

19 A. There's not --

20 Q. -- but not sealed?

21 Is that a fair statement?

22 A. There's nothing to compare. In a civilian
 23 court, anyone from the public can enter any hearing
 24 unless it's in closed doors. But these are very small
 25 number, and very narrow conditions are met.

1 Q. Was the Marwan Barghouti case -- that was
 2 in a civilian court; right?

3 A. That's right. And -- and, as I said in my
 4 report, I think it was in a civilian court because the
 5 Israeli justice system did not want the international
 6 media to cover a case in the military court system.

7 Q. Was there heightened security in the Marwan
 8 Barghouti trial?

9 A. Yes, there was.

10 Q. Did you go watch it?

11 A. No.

12 Q. Do you know people who did?

13 A. I know -- I know a -- a lawyer that was,
 14 at a very early stage, his lawyer.

15 Q. Did journalists cover it?

16 A. Absolutely.

17 Q. Did Barghouti family members go attend?

18 A. I don't know.

19 Q. Did that include Palestinian journalists?

20 A. I don't know.

21 Q. Do you know what security precautions were
 22 taken for his trial?

23 A. I don't.

24 Q. Do you know whether they were different
 25 than the security precautions that were taken in the

1 military courts?
 2 A. Mr. Yalowitz, I'm not talking about the
 3 security precautions. I'm talking about the access.
 4 Security precautions in the Israeli High Court and the
 5 Israeli District Courts and the Israeli Magistrate's
 6 Court correspond to the threats that are similar to
 7 ones that -- in the IMC. But the question is whether
 8 a person needs a permit and to explain where he goes
 9 to and why in order to enter.
 10 Q. So let me ask the question again.
 11 Were the -- were the security precautions --
 12 would you agree that the purpose of a permit is for
 13 security purposes, or do you disagree with that?
 14 A. I never got any explanation why.
 15 Q. Do you have a common sense thought about it?
 16 A. I don't think that the Israeli military courts
 17 unit is -- understands the notion of a public trial.
 18 Q. Do you -- do you have -- so your concept
 19 is that they're just unintelligent over there?
 20 A. Absolutely not. This is not what I suggest.
 21 I think it's a military unit. Military units,
 22 by their very nature, are secretive. And I'm not --
 23 I'm not holding that against them. But in a military
 24 unit that is -- that is trying civilians on a regular
 25 basis, by the thousands through four or five decades,

1 should digest the notion of public hearing. And I
 2 think they -- they -- they didn't at least at the
 3 time frame that is relevant to our discussion here.
 4 Q. Do you -- do you think there's a difference
 5 between the -- well, let me ask you this.
 6 As I understand it, the military courts that
 7 we've been discussing have jurisdiction over a wide
 8 variety of kinds of offenses; is that true?
 9 A. That's true.
 10 Q. Things ranging from traffic violations on
 11 the one hand, perhaps one end of the spectrum, speeding
 12 tickets, to -- to acts of terrorism at the other end?
 13 Is that fair to say?
 14 A. That's true.
 15 Q. Okay. So -- and -- and the 21 cases we're
 16 dealing with were all terrorism cases; right?
 17 A. Right.
 18 Q. So do you have a view on -- are you able
 19 to compare security precautions taken for public
 20 access in terrorism cases in the military courts
 21 versus terrorism cases in the civilian courts, of
 22 which the Marwan Barghouti --
 23 A. Is one.
 24 Q. -- seems to be the archetypical example?
 25 A. I don't have a knowledge and expertise in

1 this.
 2 Q. Fair enough. Okay.
 3 Now, in the military courts that we've been
 4 discussing, the accused is entitled to a translator;
 5 is that right?
 6 A. The accused is entitled to an interpreter --
 7 interpreter.
 8 Q. Interpreter.
 9 And -- and the accused has a right to object
 10 to a particular interpreter; isn't that right?
 11 A. That's right.
 12 Q. Now, in the military courts that we've been
 13 discussing, a summary record of the trial is made rather
 14 than a verbatim transcript; correct?
 15 A. That's correct.
 16 Q. And the summary record must be signed by the
 17 president of the court; is that right?
 18 A. By the -- yeah.
 19 Q. And, commonly, the summary record is actually
 20 signed by all three judges?
 21 Have you seen that?
 22 A. No, I haven't. But there is usually, at
 23 the end of each hearing, a decision made by the --
 24 by the judges, and the decision is signed by all three.
 25 But that's not a confirmation of -- of the summary

1 minutes.
 2 Q. Now, does -- as counsel for the defense,
 3 were you provided with those summary records during
 4 the course of the cases that you've handled?
 5 A. Yes, I have.
 6 Q. And do defense counsel have the opportunity
 7 to object if they feel that the record is inaccurate
 8 or incomplete?
 9 A. They do.
 10 Q. Now -- and is that -- is the fact of the
 11 objection recorded in the record of the case?
 12 A. It should.
 13 Q. Now, the defendant may request the court
 14 to summon witnesses for the defense; right?
 15 A. Right.
 16 Q. And the -- the court can hold witnesses
 17 in contempt if they fail to obey the summons; right?
 18 A. That's true.
 19 Q. And the defense has the right to examine,
 20 cross-examine, and re-examine witnesses; right?
 21 A. It has the right. It doesn't -- it doesn't
 22 mean that they have the opportunity always to do that.
 23 Q. The -- the right is subject to the control
 24 of the court?
 25 A. That is -- that is correct.

1 Q. And that's true in our courts in New York
2 as well.

3 A. Well, the question is: What are the
4 evidentiary ramifications of not being able to use
5 your right to cross-examine?

6 I mean, it's true that no judge in the
7 world can compel a person to testify if he decided
8 that he will not say a word, if we're taking torture
9 out of the equation. But the question --

10 Q. I think you would agree with me it would
11 be inconsistent with the judicial mission for a --
12 for a judge to torture a witness?

13 A. I -- I agree. Of course.

14 But the question is: What happens if the
15 defense did not have the opportunity to cross-examine
16 the witness? Will his out-of-court statement be
17 admitted to the truth or not? And that -- that is
18 a serious question which I deal with in my report.

19 Q. Have the -- have the courts, either the
20 Military Court of Appeals or the Israel Supreme Court
21 dealt with that issue?

22 A. It has.

23 Q. And what have they said about that?

24 A. The rules that govern are -- that govern now,
25 after a long evolution, is -- jurisprudential evolution,

1 is that, under certain conditions, it is permissible
2 for the prosecution to use out-of-court statements
3 of a witness that refused to answer questions by the
4 defense.

5 Q. Were those -- when you say "evolution," you
6 mean there were a number of cases that were decided --

7 A. Yeah.

8 Q. -- in our common law tradition to come to a --

9 A. Exactly.

10 Q. -- status that we have today?

11 A. That's right.

12 Q. All right. And were those cases decided by
13 courts of first instance initially?

14 A. Which cases?

15 Q. The cases you're describing involving the
16 ramifications of the --

17 A. Initially -- initially by first instance.

18 Q. And -- and then the defendants had the
19 opportunity to present their legal arguments and
20 policy arguments to the Military Court of Appeals
21 on those cases; is that right?

22 A. That's right.

23 Q. Then the defendants had their opportunity
24 to present their legal and policy arguments to the
25 Supreme Court of Israel; is that right?

1 A. These are not the same defendants. But the
2 issue has also arrived in the -- to the Israeli Supreme
3 Court.

4 Q. And -- and do you think that the questions
5 and the nuances about the admission of out-of-court
6 statements in the circumstances you describe, where
7 witnesses either are unavailable or refuse to testify
8 and, therefore, are deemed unavailable, do you think
9 those were fairly ventilated before the courts?

10 A. I don't know what "fairly ventilated" means.
11 I know that in the -- in the military courts, it's
12 a very frequent occurrence.

13 Q. I mean -- I mean, in order to arrive at
14 the rule that exists today, were -- were the appeals
15 adequately argued in --

16 A. I don't know. I haven't seen the case --
17 the case files.

18 Q. The cases that have created the rules you've
19 described, those are reasoned and published opinions?

20 A. The Supreme Court's rulings are published
21 and reasoned. I don't know about the court of --
22 Military Court of Appeals rulings.

23 Q. The -- coming back to the question of general
24 process in the military court system, you agree that
25 guilt must be determined unanimously?

1 A. No.

2 Q. You disagree with that?

3 A. I disagree. The majority is enough.

4 Q. Maybe I can refresh you on this. Let --
5 let's look at -- or perhaps you're right and I misread
6 the statute. But let -- why don't we look together.
7 We'll mark a -- if it's -- with your permission, an
8 English translation of Military Order No. 378. Bear
9 with us.

10 A. Sure.

11 Q. And I think I have the Hebrew. I have the
12 Hebrew, and I have an English translation. So we're
13 going to mark both of them so that -- so that you can
14 read it in the original --

15 A. Sure.

16 Q. -- and your counsel can follow along, since
17 he and I don't read Hebrew. I mean, I read a little
18 bit.

19 (Brief discussion held off the record.)

20 MR. YALOWITZ: Okay. So what we're going
21 to do is we're going to -- we're going to mark as
22 Plaintiffs' 115 an unofficial English translation
23 of Military Order No. 378. And then I'm -- I'm going
24 to mark as 116 a Hebrew copy of Military Order 378,
25 although I only have one copy.

1 (Plaintiffs' Exhibit 115 and Exhibit 116
 2 marked.)
 3 Q. BY MR. YALOWITZ: So you're going to be the
 4 only one --
 5 A. Sure.
 6 Q. -- to use it.
 7 A. We'll share the exhibit.
 8 MR. HILL: Kent, do you have a copy of
 9 115 for me?
 10 MR. YALOWITZ: Yes. Have we -- have we
 11 given the witness 115?
 12 THE WITNESS: Yes.
 13 MR. HILL: Thank you.
 14 MR. YALOWITZ: Sure.
 15 Q. BY MR. YALOWITZ: Okay. Now, do you have
 16 116 before you, Mr. Sfard?
 17 A. What's 116?
 18 Q. It's the Hebrew version.
 19 A. (Examining.) The Hebrew, yes. Yes.
 20 Q. Can you tell what date that document is from?
 21 Because I know that Military Order 378 has been updated
 22 and consolidated from time to time. And I'm just not
 23 sure what date this one is from.
 24 A. It's one that contains amendments until
 25 October -- 20th October, 2005.

1 Q. Okay. So -- so would you look with me at
 2 Section 20?
 3 MR. HILL: So just off the record.
 4 (Brief discussion held off the record.)
 5 Q. BY MR. YALOWITZ: Do you have it before
 6 you?
 7 A. Yeah.
 8 Q. My unofficial translation says:
 9 "No person shall be found guilty in a
 10 military court other than by the unanimous decision
 11 of the president and its members."
 12 A. Your -- your translation is wrong.
 13 Q. Could you read -- could you translate it
 14 for me?
 15 A. (Reading/translating.)
 16 "The decisions of the military court,
 17 including the verdict and sentence, will be given
 18 in majority of opinions."
 19 Q. Okay. Can -- can we pause one second --
 20 A. Sure.
 21 Q. -- while I --
 22 A. Of course.
 23 Q. -- consult with a colleague?
 24 A. Yeah.
 25 (Brief discussion held off the record.)

1 Q. BY MR. YALOWITZ: And then "guilt must
 2 be determined by a majority," and then the sentence
 3 "must be agreed upon unanimously"; is that right?
 4 A. The majority, except death sentence.
 5 Q. Except a death sentence?
 6 A. That's right. Which must be --
 7 Q. I see.
 8 A. -- unanimous --
 9 Q. Which -- which has never happened in Israel
 10 except for Eichmann; right?
 11 A. It happened in a court-martial once during
 12 the War of Independence. And it happened in the
 13 military court, but it was not carried out because
 14 it was commuted. It's one of the things that I'm
 15 very proud of as an Israeli.
 16 Q. That Israel does not have the death penalty?
 17 A. That it doesn't carry out that penalty,
 18 doesn't have a death penalty in practice.
 19 Q. It has it de jure, but not de facto?
 20 A. Yeah.
 21 Q. We could discuss further that topic, I
 22 suppose.
 23 A. I'm sure we could.
 24 Q. The -- the accused has the right to have
 25 the charge sheet read out at the beginning of the

1 hearing in front of the accused; is that right?
 2 A. You're asking about what says the law that
 3 governs these here -- these cases. And the answer
 4 is "yes."
 5 But, in practice, the indictment is almost
 6 never read out to the defendant in court. The practice
 7 is, as we see in the 21 files, is that the judges ask
 8 the defending -- the counsel for the defendant whether
 9 he has read out the indictment for the defendant, and
 10 they settle for this -- for that.
 11 Q. It's a right that counsel can advise the
 12 client to waive or not to waive?
 13 Do I have that right?
 14 A. No, I didn't say that. I'm saying that the --
 15 the court -- the practice in the court is not to read
 16 out the indictment, but to ask the defense counsel
 17 whether the indictment was read out to the defendant.
 18 Mind you that many times defense counsels are not
 19 mastering Hebrew that well, and the indictment is
 20 in Hebrew.
 21 Q. So -- so the indictment would be -- if the
 22 indictment is read out, it must be read -- and the
 23 accused does not speak Hebrew fluently, the indictment
 24 would have to be translated as it's being read; isn't
 25 that right?

1 A. As I said, the indictment is not read out.
 2 Q. Okay. So I'm -- I'm -- we're -- we're
 3 talking past each other. So let me try to -- let's
 4 try to focus -- I'll try to focus better. I'm sure
 5 it's my questions.

6 The accused has the right to a translator;
 7 isn't that correct?

8 A. To an interpreter.

9 Q. To an interpreter.

10 A. I'm saying "interpreter" because he's not --
 11 nothing is translated in -- in -- from the material
 12 from the indictment, the -- the file.

13 Q. Fair enough.

14 By "interpreter," you mean a person who
 15 is in the courtroom?

16 A. That's right.

17 Q. And when words are spoken in Hebrew, the
 18 interpreter gives the words in Arabic?

19 A. That's what he's supposed to do.

20 Q. Or if -- or if the accused were an English
 21 speaker, the interpreter would have to read out the --
 22 or trans -- interpret the Hebrew into English; right?

23 A. That's what they are supposed to do.

24 Q. And so when I say "translator," I'm --

25 A. Okay.

1 Q. -- I'm being imprecise, and you're --
 2 you're being more precise by talking about somebody
 3 who translates written documents?

4 A. That's what I mean by "translation."

5 Q. That's the distinction that you're making?

6 A. Yeah.

7 Q. Okay. So I'll try to go with your lingo.

8 A. Okay.

9 Q. And -- and so if -- if there -- whatever
 10 proceedings there are in the -- in the military court,
 11 the interpreter is required to interpret them.

12 And is the -- is the interpreter sworn to
 13 interpret to the best or his or her ability?

14 A. I don't remember if they're sworn. I don't
 15 think -- there is no swearing in general. They're --
 16 they're --

17 Q. Affirming?

18 A. -- affirming.

19 Q. Yeah.

20 A. Yeah. I don't -- I don't recall seeing
 21 a interpreter sworn in a case. They might be sworn
 22 in general -- I don't know -- or affirmed.

23 But in any event, they are supposed to
 24 interpret to Hebrew Arabic and to Arabic Hebrew.
 25 And as -- as mentioned in the -- in my report, in

1 the Yesh Din report, those interpreters are not
 2 professional interpreters. They are young Druze
 3 or Bedouins whose only quality for interpretation
 4 is that they are native Arabic speakers.

5 Q. Do you -- do you have any statistics on
 6 how frequently the -- the interpreters are objected
 7 to in the military courts?

8 A. No, I do not.

9 Q. Do you know whether, in any of our 21 cases,
 10 the interpreter --

11 A. I haven't --

12 Q. -- was objected to?

13 A. I haven't seen any objection in those 21
 14 cases.

15 Q. So coming back to the charge sheet, do we
 16 agree that the Military Order 378 provides the accused
 17 with a right to have the charge sheet read out?

18 A. Can you point me to the article?

19 Q. I was afraid you were going to say that.

20 A. No, because I want to be very accurate --

21 Q. Yeah, yeah.

22 A. -- if it's the right to be read out or to
 23 be handed.

24 Q. Yeah. Let's -- let's see if I can find it.

25 It appears -- it appears in my version of 21(b) like

1 "bravo."

2 A. 21(b). Yeah, you are right.

3 Q. Okay.

4 A. It says that the court will read out the
 5 charge sheet.

6 Q. And -- and when you say it's the practice
 7 not to do that, you understand that that's a strategic
 8 decision or a -- a trial judgment that the counsel
 9 are making or that the witness -- that the accused
 10 is making; right?

11 A. Okay. My answer to you on this is the
 12 following. Being a defense attorney in the military
 13 courts, you get accustomed -- you're -- you're joining
 14 a culture in which there are many practices that deviate
 15 from the letter of the law, like this one. And it
 16 is exactly the kind of failures that -- to uphold due
 17 process rights to their letter that it was me -- I was
 18 very much afraid to get accustomed to.

19 Yes, you're right, a defense attorney should
 20 object to the idea that a judge would not read out the
 21 charge sheet and instead let him, definitely if he is
 22 not a master in Hebrew, interpret the charge sheet to
 23 the defendant. Yes, in most cases, the defense
 24 attorneys cooperate with that practice.

25 Q. So when you were with Avigdor Feldman, did

1 he object to the -- or did he insist on the reading
 2 out of the charge sheet?
 3 A. I don't recall that he did.
 4 Q. And you would agree with me that -- I can't
 5 remember the exact -- you -- you made some critical
 6 comment about being corrupted by the system or something
 7 like that.
 8 You would agree with me he's not such a
 9 person; right?
 10 A. I agree that he's not.
 11 Q. Thank you.
 12 Now, the court is required, before accepting
 13 a guilty plea, to be satisfied that the accused fully
 14 understands the nature of the charge brought against
 15 him and the implications of his admission of guilt;
 16 correct?
 17 A. Again, which -- yeah, I -- it sounds like
 18 what is said in the order.
 19 Q. Every person tried in the military courts
 20 is entitled to be present during the whole trial,
 21 so long as he conducts himself properly; correct?
 22 A. Correct.
 23 Q. I think we spoke about this earlier. And I --
 24 I didn't see it in 378. But as I understand -- well,
 25 let me ask you this.

1 378 was re-codified as Military Order 1651
 2 at some point; is that right?
 3 A. Correct.
 4 Q. And so was -- was 1651 revolutionary, or
 5 was it simply a collection of orders that had been
 6 in scattered places before?
 7 A. I have not made comparisons between 1658
 8 [sic] and 378. It is supposed not to be revolutionary.
 9 It is supposed to be a reorganization of the -- of
 10 the order.
 11 Q. Before I -- before I leave the reading out --
 12 or I may have already left it, but let me come back
 13 to it.
 14 Do you know what the practice of reading
 15 out of the charge sheet is in the civilian courts?
 16 A. It's the same.
 17 Q. Thank you.
 18 A. Can I add something?
 19 Q. Of course.
 20 A. In -- in the civilian courts, most, if not
 21 all -- almost all accuseds read, write, and talk Hebrew,
 22 and they get a charge sheet in Hebrew.
 23 Q. Are there -- and I'm just curious more than
 24 anything, because I don't know.
 25 There's a significant population of ethnic

1 Arabs in -- who live in Israel; right?
 2 A. Yeah.
 3 Q. And they're -- they're educated in Arab
 4 schools; right?
 5 A. In Hebrew.
 6 Q. And they're educated in Hebrew, so they all
 7 speak and read and write Hebrew?
 8 A. Absolutely.
 9 Q. That was what I was curious about.
 10 And the -- the same is true of Bedouins?
 11 A. Those who go to school. This is a very big
 12 problem in -- in Israel --
 13 Q. Uh-huh. Now, I noticed --
 14 A. -- having schools for Bedouins.
 15 Q. I noticed, going around the countryside here,
 16 that today there are many workers from foreign lands.
 17 Have you noticed that as well?
 18 A. I have.
 19 Q. People from China?
 20 A. I have.
 21 Q. People from Thailand; is that right?
 22 A. Yes.
 23 Q. Do those people -- people speak and read
 24 Hebrew?
 25 A. No.

1 Q. And --
 2 A. Well, most of them don't, I guess.
 3 Q. Many of them do not? I mean, I'm -- just
 4 in your experience?
 5 A. Yeah.
 6 Q. You obviously haven't done a study or
 7 anything.
 8 And then I noticed that going around the
 9 streets of Tel Aviv -- you live in Tel Aviv?
 10 A. I do.
 11 Q. And have you noticed that, in recent years,
 12 there's been an influx of refugees from Africa?
 13 A. Yeah.
 14 Q. And those are people who are not Jewish;
 15 right?
 16 A. I guess they're not.
 17 Q. They're from Darfur and other places where
 18 there --
 19 A. Sudan.
 20 Q. -- where there are war-torn regions?
 21 A. Yeah.
 22 Q. And Israel has taken them in?
 23 A. Israel has taken them in -- in is a very
 24 bizarre way of --
 25 Q. They've come from --

1 A. -- describing the way Israel tried to not
 2 allow them in. But --
 3 Q. They're --
 4 A. -- nevertheless, they're here.
 5 Q. They're here.
 6 And do they speak, read, and write Hebrew?
 7 A. Not as a Hebrew native speaker, absolutely
 8 not.
 9 Q. And -- and has -- I've heard -- I don't know
 10 whether it's true. But I've heard that there's been
 11 an increase in street crime among people who are not
 12 native Israelis.
 13 A. There are disagreements about the statistics.
 14 Q. Some say yes, some say no?
 15 A. There are statistics that suggest that the
 16 rate of crime among asylum seekers is lower, actually,
 17 than among permanent citizens.
 18 Q. Do -- do you have any experience defending
 19 non-native Hebrew speakers in Israel?
 20 A. No, I don't.
 21 Q. I'm going to ask you some questions. You
 22 should feel free to flip through 378 in front of you.
 23 But I'll tell you that they're not in there. So this --
 24 these are questions that you're going to have to answer
 25 from your brain.

1 A. Okay.
 2 Q. As I understand it, there is a right to
 3 a re-trial if a piece of evidence is fundamentally
 4 based on a lie or forgery?
 5 Have you heard that?
 6 A. Again?
 7 Q. Sure. Why don't we take it bigger, and
 8 then we'll bring it smaller.
 9 A. Okay.
 10 Q. There is ability to gain a re-trial in the
 11 military court system; right?
 12 A. Yes.
 13 Q. And what are -- what do you understand the
 14 bases for re-trial to be?
 15 You mentioned miscarriage of justice as one?
 16 A. Yeah. I mean, miscarriage of justice is
 17 the -- is the presiding principle. Now, it can be
 18 in the form of a central piece of evidence revealed
 19 to be force. It may be other grounds. I'm not --
 20 you know, I don't remember by heart what are the
 21 grounds.
 22 Q. New evidence would be one; right?
 23 A. New evidence that have the potential of
 24 overturning the judgment.
 25 Q. That's true not only in the civilian courts

1 but also in the military courts?
 2 I think my question was military courts,
 3 but --
 4 A. I --
 5 Q. -- just to make sure.
 6 A. I'm not -- you know, I'm not familiar with
 7 the exact governing principles of re-trial in the
 8 military courts. I guess and I would expect it to
 9 be pretty similar to those in the civilian courts.
 10 Q. Now, there is an -- a provision in Military
 11 Order 1651, which I don't have a paper copy of, but
 12 we could look it up if you disagree -- but I think
 13 you'll agree -- which provides words to the effect of:
 14 In matters of adjudication, there is no authority over
 15 one authorized to adjudicate apart from the authority
 16 of the law and the security legislation.
 17 Do you agree with that?
 18 A. I agree that this is an article in -- in
 19 Order 1651.
 20 Q. And would you agree that the High Court
 21 of Justice -- was the -- was the Marabi case, that
 22 was a High Court of Justice case?
 23 A. If you -- there are several Marabi -- if you
 24 mean the -- the one that deals with the separation fence
 25 in the Alfie Menashe area, the one that I've litigated,

1 then yes. Or do you mean Mar'ab, which dealt -- Mar'ab,
 2 which dealt with the -- with the period of detention
 3 without judicial review in the military court system?
 4 Q. That's the one I'm thinking of.
 5 A. It was in the High Court.
 6 Q. And in -- in that case, the court reiterated
 7 that judicial officers in the military court must be
 8 independent of the investigators and prosecutors, free
 9 of bias, and authorized to release a detainee; is that
 10 right?
 11 A. I don't recall the exact words. But I agree
 12 that that was the -- one of the things that was said
 13 in -- in the judgment.
 14 Q. Now, is it a -- is it a -- is there a basic
 15 right to due process under the law of Israel?
 16 I -- I may have said that in a way that was
 17 not so good. But try it and, if you need me to restate
 18 it, I will.
 19 A. Israel does not have a bill of rights or
 20 a constitution. It has a partial constitution made
 21 up of basic laws. However, the Israeli High Court
 22 of Justice and the Israeli Supreme Court have evolved
 23 during the years and generated case law that provides
 24 for basic rights. And, yeah, a fair trial and due
 25 process rights are considered to be human rights in

1 Israel, in Israeli law.
 2 Q. And so if, during the course of a trial,
 3 you feel that your client is not receiving due process,
 4 are you -- do you have the opportunity to bring that
 5 to the attention of the court while it's happening?
 6 A. Sure.
 7 Q. And does the court have an opportunity --
 8 does the court have an obligation to listen to you
 9 and evaluate whether or not it is, in fact, providing
 10 adequate process?
 11 A. Yes.
 12 Q. And then having raised such an issue, if the
 13 court rules against you, do you have the opportunity
 14 to appeal that issue to a higher court?
 15 A. In criminal cases, there is no appeal in
 16 term appeal, only appeal on judgment. In very rare
 17 cases, as I mentioned before, it is possible to file
 18 a High Court petition against the court.
 19 Q. Even without interlocutory appeal, certainly
 20 at the end of the proceedings, you would have a right
 21 to appeal your due process claims; right?
 22 A. Right.
 23 Q. And then, is that true not only in the
 24 civilian courts but also in the military courts we've
 25 been discussing?

1 A. In general, yes.
 2 Q. And it's also true that, in the military
 3 courts, the attorney has a right to object on the
 4 grounds that the accused's due process rights are
 5 not being upheld; correct?
 6 A. It may raise the issue before the court.
 7 Q. And the -- and the trial judges have an
 8 obligation to consider that claim on the merits; right?
 9 A. They have an obligation.
 10 Q. And then, following appeal to the Military
 11 Court of Appeals, if the Military Court of Appeals
 12 rejects the due process claim, is there a further
 13 right of direct appeal to the Supreme Court of Israel?
 14 A. No.
 15 Q. So the -- the only way to -- well, is there --
 16 is there another way to raise that issue to the Supreme
 17 Court of Israel at that time?
 18 A. One can file a petition to the High Court
 19 of Justice against the Court of Appeals.
 20 Q. And that's called a Bagatz?
 21 A. That's it.
 22 Q. And what -- what are the procedural obstacles
 23 to filing a Bagatz to the Military Court of Appeals?
 24 A. Procedural obstacles? There is a court fee.
 25 Q. How much is the court fee?

1 A. About 2,000 shekels. Actually, for detainees
 2 it's much less.
 3 Q. How much is it for detainees?
 4 A. Much, much less. I think 100 shekels.
 5 Q. That's about \$25?
 6 A. Yes. There are -- there are no major
 7 procedural obstacles.
 8 Q. Now, do you believe that -- well, have you
 9 raised -- let me ask you this.
 10 Have you raised due process concerns in
 11 criminal cases that you've been involved with?
 12 A. Constantly.
 13 Q. And has -- when you were with Mr. Feldman,
 14 did he do that as well?
 15 A. Constantly.
 16 Q. And did you believe that the judges who were
 17 considering those due process claims had sufficient
 18 objectivity to be able to rule on them?
 19 A. Sometimes yes and sometimes less.
 20 The problems begin with interpreters who stop
 21 interpreting. And then you object to the continuation
 22 of the hearing without instructing the interpreter to
 23 keep on interpreting. And then he does. And then he
 24 stops again. It's with not allowing family members
 25 to enter the courtroom, and then you object to that.

1 Look, you have to understand that, in this
 2 system, you have to choose your battles. You cannot
 3 raise an objection for every due process problem. The
 4 only option is not to engage in that system. And that
 5 is what I've done since 2006. It's impossible and
 6 improbable to raise all the due process concerns that
 7 you have if you are genuinely interested in providing
 8 your client with due process.
 9 Q. Do you think Mr. Feldman is genuinely
 10 interested in providing his clients with due process?
 11 A. I think Mr. Feldman, like many other attorneys
 12 that operate in the military courts, is trying to do
 13 the best for their client. And I, by not going to the
 14 military courts, have -- have done what is best for me.
 15 Q. I'm sorry. I just want to look at my question
 16 again. (Examining.)
 17 Would you like a break?
 18 A. No.
 19 Q. Okay.
 20 A. I'm fine. I'm fired up.
 21 (Brief discussion held off the record.)
 22 Q. BY MR. YALOWITZ: Do you -- do you think that
 23 Mr. Feldman is genuinely concerned about the due process
 24 rights of his clients?
 25 A. I have no doubt, and I know that he does.

| | |
|--|--|
| <p style="text-align: right;">Page 101</p> <p>1 Q. To the best of your knowledge, he continues 2 to participate in the military court system; is that 3 correct?</p> <p>4 A. At a very, very small scale, yes.</p> <p>5 Q. That would be a "yes"?</p> <p>6 A. That would be on a very, very small scale, 7 yes.</p> <p>8 Q. All right. You agree with me that, in the 9 military courts, at the close of the prosecution's case, 10 if there's insufficient evidence, the judge -- judges 11 must acquit?</p> <p>12 A. Yes.</p> <p>13 Q. Have you found that, in the military courts, 14 in your experience, defendants have inadequate time 15 to prepare their cases?</p> <p>16 A. I found that, in military courts, defendants 17 have inadequate time with their counsels to prepare 18 a defense. Most counsels, at the relevant time frame, 19 or many of the counsels were Palestinians from the 20 West Bank, who were not able to enter the sovereign 21 area of the State of Israel where most of the detainees 22 were held.</p> <p>23 Q. Does the -- does the counsel have a right to 24 ask for an adjournment if he or she has had inadequate 25 time to prepare a defense?</p> | <p style="text-align: right;">Page 103</p> <p>1 Q. There's a case from the Military Court of 2 Appeals -- which I'm going to mangle the name -- Omer 3 Freed Hassan Acam against military prosecutor. 4 Are you familiar with that case?</p> <p>5 A. No.</p> <p>6 Q. The case has been translated for me to say 7 that there's a fundamental obligation for prosecutors 8 to provide for the defendant's review all disclosed 9 investigative materials pertaining to his case. 10 Is that a familiar concept to you?</p> <p>11 A. It is a familiar concept. It is not followed 12 by the military prosecution, at least in the time frame 13 that we were dealing with. As I write in my report, 14 GSS files were not given to the defense unless the 15 defense asks or even demands it.</p> <p>16 Q. Do you -- I'm sorry. Say that -- say the 17 last thing again.</p> <p>18 A. The GSS files, interrogation files, are not 19 provided to the defense with the indictment, as they 20 should. The defense has to ask for it.</p> <p>21 Q. How do you know that?</p> <p>22 A. From my practice and from the practice of 23 other defense attorneys.</p> <p>24 Q. Which ones?</p> <p>25 A. I don't remember the names of the defense</p> |
| <p style="text-align: right;">Page 102</p> <p>1 A. They have a right to ask whatever they want.</p> <p>2 Q. And -- and does the court have an obligation 3 to provide them with an adjournment if they say that 4 they've had inadequate time with their client to provide 5 a -- to prepare a defense?</p> <p>6 A. The judges are supposed to allow enough time 7 for preparing a defense.</p> <p>8 Q. If the trial is unduly delayed, does the 9 defendant have the right to request a release?</p> <p>10 A. They have a right to request.</p> <p>11 Q. And if the trial is unduly delayed, does 12 the court have an obligation to provide a release?</p> <p>13 A. No. But the court has an obligation to 14 examine their request and balance between the rights 15 of the -- of the defendant to be presumed -- to be 16 seen as innocent and, thus, his liberty to be upheld, 17 and the security considerations and so on.</p> <p>18 I don't have statistics. But from my 19 experience and from my understanding of the subject 20 matter, I don't recall even one case where a detainee 21 was released because of the prolongation of the -- 22 of the hearings in terror cases.</p> <p>23 Q. Do you think that's wrong?</p> <p>24 A. The question should be asked on a case-by-case 25 basis.</p> | <p style="text-align: right;">Page 104</p> <p>1 attorneys that I talked to. But the -- the defense 2 attorneys that operate in -- in -- in the military 3 courts are -- have been meeting each other in the 4 military court during the time that I was active there. 5 And it was a known practice that you should ask for 6 the GSS file. Otherwise, you don't get it.</p> <p>7 Not only that, but once you ask for it, it 8 will take about two months for you to get it because 9 it has to go through a process of declassification. 10 And during that time, your client will be usually 11 in detention.</p> <p>12 Q. What's the procedure for requesting the 13 investigative file from the GSS?</p> <p>14 A. Well, you send a letter to them. And if 15 they don't respond, you can file a motion.</p> <p>16 Q. Do you -- do you file the letter with the 17 court, or do you just send it to the prosecutor?</p> <p>18 A. I send it to the prosecutor.</p> <p>19 Q. So -- so -- and if you don't -- if you don't 20 get satisfaction, then you file a motion?</p> <p>21 A. That's right.</p> <p>22 Q. And -- and what if the -- what -- and -- 23 and this was common practice that you learned from 24 your dozen or so cases in the military courts?</p> <p>25 A. Yes.</p> |

1 Q. And what is the practice with regard to
2 certificates of immunity?
3 A. What do you mean by "what is the practice"?
4 Q. So -- so suppose that the -- suppose that
5 the prosecutor comes back to -- is it the prosecutor
6 or the GSS that you send the request to?
7 A. The prosecutor.
8 Q. So -- so you'd ask the prosecutor for the
9 GSS files; right?
10 A. Yeah.
11 Q. And -- and as you -- I think you testified
12 earlier you've seen many, many GSS files; right?
13 A. That's right.
14 Q. And sometimes GSS files contain classified
15 information; right?
16 A. Right.
17 Q. And the prosecutor has an obligation, in
18 that case, to withhold certain portions of the files;
19 is that right?
20 A. Yes. There is a special unit -- military
21 unit that deals with declassification.
22 Q. And -- and --
23 A. Or maybe the GSS. I'm not sure.
24 Q. And then are the files redact -- if they
25 contain information that would compromise security

1 if they're released, are they redacted before they're
2 released?
3 A. Yes.
4 Q. And are there other grounds for redaction,
5 like -- like personal information about the -- the
6 accused --
7 A. No.
8 Q. -- anything like that, like -- like his
9 salary or --
10 A. That should be redacted from the defense
11 attorney? No.
12 Q. Right. Okay. And -- and then is there
13 a procedure for challenging the redactions?
14 A. The redactions should be accompanied by a
15 immunity certificate.
16 Q. And is the immunity certificate filed with
17 the court?
18 A. It should, yes.
19 Q. It should, but sometimes isn't in practice?
20 A. In the 21 files that -- that you've supplied
21 us -- that the plaintiffs supplied the defense in this
22 case, I found only one immunity certificate. And I'm
23 sure that there were immunity certificates in other --
24 others.
25 Q. So the inference you draw is that the immunity

1 certificates simply weren't filed with the courts?
2 A. Well, if I understand correctly and the files
3 you've supplied us with come from the military court
4 files, then that's my understanding. Yes.
5 Q. And then if the -- what is the prosecution's
6 duty if the redacted portions contain exculpatory
7 information?
8 A. The prosecution is not supposed to -- I mean,
9 it's not the prosecution. It's the military commander
10 who signs a immunity certificate. And I'm not sure
11 that they are -- that he is under any obligation to
12 review for -- for evidence that may help the accused.
13 It is the duty of the Military Court of Appeals, when a
14 motion is filed, to cancel or narrow down the immunity.
15 Q. So do I have it right that defendants in
16 the military courts are entitled to all exculpatory
17 evidence, even exculpatory evidence found in GSS files?
18 A. They are. Well --
19 Q. And then --
20 MR. HILL: Hold on.
21 THE WITNESS: They -- they're --
22 MR. HILL: Let him finish his question.
23 THE WITNESS: Okay.
24 Q. BY MR. YALOWITZ: You go ahead. But I --
25 you -- you --

1 A. No, you understand.
2 Q. No, no. I insist. You go ahead.
3 A. They -- they are entitled to either get all
4 the --
5 Q. Exculpatory evidence.
6 A. -- exculpatory evidence or that the indictment
7 will be canceled if they don't get it.
8 Q. That was what I was going to ask.
9 Now, counsel has the right and obligation
10 to make legal arguments to the court in the military
11 courts of justice; is that right?
12 A. In the military courts, yes.
13 Q. And the -- and the court has the obligation
14 and right to consider those arguments in good faith;
15 right?
16 A. Right.
17 Q. I think you told me earlier that the -- the
18 basic -- we talked about the basic law.
19 There is now a -- something called the basic
20 law of human dignity and liberty?
21 A. Right.
22 Q. When -- when was that adopted?
23 A. 1992.
24 Q. And that applies to all authorities; right?
25 A. Right.

| | |
|--|--|
| <p style="text-align: right;">Page 109</p> <p>1 Q. That applies to military courts? 2 A. It does. 3 Q. And did you have an opportunity to read the 4 report of Daniel Reisner? 5 A. I have. 6 Q. Do you know Mr. Reisner? 7 A. Very well. 8 Q. Do you work with him? 9 A. I worked in some cases where he was the 10 attorney for the -- for the Army. 11 Q. Did you find him to be a competent and 12 professional adversary? 13 A. You want me to pass judgment on a colleague? 14 I think Mr. Reisner is a very knowledgeable 15 attorney. I think that his views on legal matters of 16 international humanitarian law are not acceptable. 17 I think that he has, in many cases, made arguments 18 that are completely -- or he didn't make the cases. 19 He -- he was behind the scenes. But he tailored 20 the legal justification for some practices in a -- 21 in a fashion that is not in -- in conformity with 22 international humanitarian law. We -- we see things 23 differently. 24 Q. Fair enough. I -- I think that's -- 25 A. But I like him.</p> | <p style="text-align: right;">Page 111</p> <p>1 Q. What is it? 2 A. It's a doctrine which states that if -- that, 3 for certain very minor issues, the court would not deal 4 with, and so it will cancel or acquit defendants. 5 Q. That applies in the military courts? 6 A. I read for the first time, in Reisner's 7 report, that there was such a judgment. 8 Since judgments of the military courts are 9 not disseminated, I couldn't check it. And since we 10 didn't get -- I didn't get -- I asked for the -- for 11 the judgments to be supplied, because there is no way 12 for me to get these judgments. They were not cited 13 with any publication that I can go to a library and -- 14 and look for it. So I did not have the opportunity 15 to go through, so I cannot -- I cannot say. 16 Q. Did you try? 17 A. How? 18 Q. Did you go to a library? Did you go to the -- 19 A. No. The military courts' cases -- military 20 courts' cases of first instance are not published. 21 Military court cases of the Court of Appeals, only 22 a selection of them is being published. And since 23 Mr. Reisner, in his report, did not cite publication -- 24 the publication, I didn't try to -- to look for them. 25 I asked for them to be handed over. And until</p> |
| <p style="text-align: right;">Page 110</p> <p>1 Q. That's not uncommon among lawyers that they 2 see things differently but still respect each other. 3 Is that your situation with Reisner? 4 A. Yeah. 5 Q. He mentioned in his report -- did I ask you 6 if you read his report? 7 A. Yes. 8 Q. And you did? 9 A. I did. 10 Q. And he -- he mentioned that -- that the 11 de minimis doctrine applies in the military courts. 12 Do you agree with that? 13 A. I don't. Mr. Reisner has made a report that 14 is based on the law and case law. That is a -- that 15 is a work that can be done by students and has nothing 16 to do with practice. 17 Q. Let me ask the question again. Well, let me 18 ask it a little differently, then, because I -- I don't 19 want to -- I really don't want to debate with you about 20 Mr. Reisner's report. 21 A. Okay. 22 Q. There's a -- there's a doctrine called the 23 de minimis doctrine. 24 Do you know what that is? 25 A. I do.</p> | <p style="text-align: right;">Page 112</p> <p>1 yesterday, I didn't get it. So it might -- 2 Q. You mean until today, even sitting here today, 3 you haven't seen it? 4 A. No, I haven't seen it. 5 Q. I just wanted to make that clear, because 6 you said "until yesterday." 7 A. No, no, no. 8 Q. But you haven't actually seen it? 9 A. No, no, I haven't seen it. 10 Q. Okay. It must be an idiom. 11 A. Yeah. 12 Q. All right. Abusive process, that's a defense 13 that applies in the military courts as well; is that 14 right? 15 A. I understand -- I know that it is. 16 Q. And there's a -- a rule that mentally unfit 17 defendants may not be held criminally liable in the 18 military courts; is that right? 19 A. I believe that this is -- this applies in 20 the military courts. 21 Q. I -- I think we've established this, but 22 just so I'm 100 percent sure, there is a right to 23 appeal every final judgment in the military courts? 24 A. Yes. 25 Q. And if -- if a defendant pleads guilty and</p> |

1 is unhappy with the sentence that's handed down, the
 2 defendant can appeal just the sentence; is that right?
 3

A. That's right.

4 Q. And the defendant can agree on certain
 5 facts and -- and argue that, even though the facts
 6 are stipulated, for -- for various legal reasons,
 7 he should be acquitted; right?

A. Right.

9 Q. And -- and can the defendant plead guilty
 10 and then appeal on the basis of some agreed issue
 11 that has been resolved adverse to him?

A. Sorry. Can you repeat that?

13 Q. Sure. I mean, sometimes situations arise
 14 where -- where there's a -- oh, I don't know -- a
 15 very important piece of evidence that -- that the
 16 witness asks be suppressed, for example, a post-arrest
 17 statement --

A. Uh-huh.

19 Q. -- right?

20 A. Right.

21 Q. So in -- I don't -- I'm not sure we touched
 22 on this. But if -- if -- I think we did -- that the
 23 defendant has a right to a suppression hearing to have
 24 the court evaluate whether his post-arrest statements
 25 were coerced; right?

1 A. Right.

2 Q. And if -- if the court concludes, based on
 3 the evidence, that the post-arrest statements were
 4 coerced, those are going to be excluded; right?

5 A. That's -- that's how it's supposed to happen.

6 Q. And -- and then it happens, from time to time,
 7 both in the military courts and in the civilian courts,
 8 that post-arrest statements are not suppressed despite
 9 the defendant's argument to the contrary; right?

10 A. That they're not suppressed, right.

11 Q. And so are there cases where the -- the
 12 defendant pleads guilty following the denial of a
 13 request to suppress evidence, while preserving the
 14 right to appeal on the ground that the evidence
 15 should have been suppressed?

16 A. I actually must say that I've never
 17 encountered such a thing.

18 Q. If the evidence --

19 A. Pleads guilty and -- and retain the -- the
 20 possibility of appealing against -- I -- I honestly
 21 don't think that this is something we have ever
 22 encountered.

23 Q. We do that.

24 A. Yeah. Well --

25 Q. But we have juries too.

1 A. Yeah. So it's different.

2 Q. Very different; right? You don't have any
 3 juries here in Israel; right?

4 A. No.

5 Q. What do you think of the jury system?

6 A. I know very little about the jury system.

7 But we do have lay judges in -- in the Israeli system,
 8 both in military courts that try judges -- sorry --
 9 try soldiers, in employment tribunals. And in the past,
 10 in the military courts there were lay judges. So --
 11 and -- and lay judges are a remnant of juries of your
 12 peers.

13 Q. Uh-huh.

14 A. But -- but lay judges in the military courts
 15 is not the same because the equivalent would have been
 16 a Palestinian on the military bench.

17 Q. So -- so there's been some back-and-forth
 18 in some of the expert reports about exactly when lay
 19 judges were eliminated in military courts that tried
 20 security offenses.

21 Do you -- do you have an opinion on when
 22 that practice ended?

23 A. The law changed in 2004. The practice was
 24 changed between 2002 and 2004 gradually.

25 Q. And --

1 A. If the --

2 Q. And if I have it right -- I'm sorry. I
 3 didn't mean to interrupt. Please continue.

4 A. I don't know when was the last time that
 5 a lay judge was sitting in the military courts between
 6 2002 and 2004.

7 Q. It's a pretty narrow window?

8 A. Yeah.

9 Q. All right. Now -- and do I have it right
 10 that lay judges continue to sit in the military courts
 11 that try soldiers?

12 A. Yes. But they are sold -- they are also
 13 soldiers -- officers and -- that represent the idea
 14 of being tried by your peers.

15 Q. Do -- do you think that it's appropriate to --
 16 well, let me strike the question.

17 Do you think the ethnicity of the lay judges
 18 matters?

19 A. I think the question of whether a lay judge
 20 is an officer or a civilian in a court that tries
 21 civilians is of matter.

22 Q. Well, what about the -- I think you mentioned
 23 labor courts or employment courts --

24 A. Yes.

25 Q. -- where there are lay judges?

1 A. Yeah.
 2 Q. Does the ethnicity of those judges matter?
 3 A. Again, in employment court, it's not ethnicity
 4 but rather being a -- a representative of employees
 5 or employers.
 6 Q. Uh-huh. So -- so unions appoint some of
 7 these judges and management appoints some judges?
 8 A. Right.
 9 Q. I see. And then are -- well, I'll ask you
 10 at a break. Sometimes I just get curious.
 11 A. I -- I --
 12 Q. We did that.
 13 Let me ask you about scrutiny of GSS
 14 investigations post PCATI.
 15 A. Right.
 16 Q. What -- what are the mechanisms of -- what
 17 are the official mechanisms within the State of Israel
 18 for scrutiny of such investigations?
 19 A. The GSS has an internal fonctionnaire whose
 20 role is to consider allegations made by -- by suspects
 21 who were interrogated by GSS investigators. It was the
 22 contention of the human rights community in Israel that
 23 this is inappropriate that -- that this is an internal
 24 affair and that this role must be handed over to an
 25 external person that is not a member of the GSS.

1 As I wrote in my report, the numbers --
 2 the figures show that this comptroller -- internal
 3 comptroller has audited some 700 cases and found no
 4 reason to launch a criminal investigation against --
 5 in any of the cases.
 6 Q. This -- this is an internal GSS -- like
 7 an inspector general type?
 8 A. I don't know what "inspector general" is.
 9 But if --
 10 Q. I was going to ask you if you knew what
 11 that was.
 12 A. No. But what I'll say is the following.
 13 A criminal investigation would not open
 14 against a GS -- a member of the GSS unless this --
 15 this position, this guy, will first review the
 16 allegations. And only if he thinks, or she, that
 17 the allegations have merits, only then it will be
 18 passed on to the civilian authorities in order to
 19 launch an investigation. This has not happened.
 20 Q. Now, what is the -- what is the reporting
 21 mechanism from the government of Israel to the U.N.
 22 Committee Against Torture?
 23 A. There is a periodic report.
 24 Q. And who -- who's responsible for preparing
 25 that report? Is it the same GSS invest -- inspector?

1 A. No. It's the Ministry of Justice.
 2 Q. And how does the Ministry of Justice get
 3 the information about the number of times in which
 4 allegations of torture, cruel, inhuman, or degrading
 5 treatment occurs?
 6 A. I don't know.
 7 Q. In addition to the GSS inspector, is there
 8 a civilian oversight board of some kind?
 9 A. The -- the Israeli Parliament, the Knesset,
 10 has a committee that is supposed to preside over --
 11 a committee of security and -- and foreign affairs.
 12 And they have a -- a subcommittee that deals with --
 13 with intelligence agencies. But they do not review
 14 allegations or -- or specific cases. They're --
 15 they're -- this is the Parliament overseeing the
 16 Executive.
 17 Q. Do -- do they have a staff, that -- that
 18 Knesset committee?
 19 A. Do they have a staff?
 20 Q. Yeah.
 21 A. I suppose they do. I don't know.
 22 Q. Do they have subpoena power?
 23 A. They have subpoena power, but it can be
 24 suppressed by the minister. So the minister can
 25 appear instead of the civil servants if -- if --

1 if they so wish.
 2 Q. The -- the minister in charge?
 3 A. In -- in charge. In -- in this case, the --
 4 the Prime Minister.
 5 Q. So -- so I'm not sure I follow it. But --
 6 A. If -- if -- sorry. Go on.
 7 Q. Can you explain?
 8 A. Look, I haven't examined this because I
 9 wasn't aware you're going to ask me this question.
 10 So I can check this and be sure.
 11 But from what I remember, Knesset committees
 12 may subpoena civil servants to appear before them and
 13 answer questions. The minister of the governmental
 14 office, where this civil servant serves, may decide
 15 that he will appear instead of --
 16 Q. I see.
 17 A. -- the civil servant.
 18 Q. But somebody has to appear and --
 19 A. Yeah.
 20 Q. -- explain?
 21 All right. Now, and -- and, by the way,
 22 it's not a -- if you don't know something, it's --
 23 you're doing very well. You're -- you're --
 24 A. Thank you.
 25 Q. You shouldn't feel like I'm -- I'm not trying

1 to embarrass you or anything like that. All right.

2 The -- to your knowledge, besides the GSS
3 inspector, the Knesset committee we've just described,
4 and the report to the U.N. committee, are there other
5 official mechanisms within the government of Israel
6 that deal with allegations of torture, cruel, inhuman,
7 or degrading treatment?

8 A. There is the High Court of Justice.

9 Q. And -- and does the High Court of Justice --
10 it means there was just that one famous case, or do
11 do these issues come up from time to time?

12 A. The issues come up very rarely. And they
13 come in the form of reviewing whether the oversight
14 mechanisms are -- are effective or not. I think the
15 main oversight over GSS investigations can only be
16 the criminal trials in which the statements taken
17 from the suspects in the GSS investigations are being
18 admitted into trial. This is one of the -- one of
19 the most important roles of a court of law.

20 Q. May -- may I just interrupt you? Because I
21 want to make sure that I understand. And I apologize.

22 A. No problem.

23 Q. But are you -- are you describing criminal
24 trials in which -- in which the accused or witnesses
25 assert that their statements were coerced and the

1 I have to say that I understand that recently,
2 very recently, indeed this -- this issue of taking the
3 role of internal investigation out of the GSS was one
4 of the recommendations of the Turkel committee. And
5 I understand that there was now appointed a new, like,
6 controller who is not a GSS employee. So that's --
7 that's very recent.

8 Q. So let me make sure I -- I've exhausted the
9 possibilities. So I'm -- I'm going to summarize and
10 then -- and if I get it wrong, please tell me. I'm
11 not trying to put words in your mouth.

12 A. Okay.

13 Q. But as I understand it, at least at the time
14 period we're talking about, pre-Turkel Commission, we
15 had a GSS inspector, number one; we had reports to the
16 U.N. Committee Against Torture, number two; we had a
17 committee of the Knesset, number three; we have the High
18 Court of Justice, number four; we have individualized
19 criminal trials, number five; and we have, at least in
20 power, the Attorney General, number six.

21 Are there any other official channels by which
22 allegations of cruel, inhuman, degrading treatment or
23 torture can be investigated and brought to light?

24 A. I agree with your description. That is not
25 to say that I think that any of those have been, in

1 court has to examine the facts and circumstances
2 about the allegations of coercion?

3 A. I'm saying, in these circumstances, a
4 court should investigate fully what happened. And
5 I think that that should have been -- and it's not
6 unfortunately -- should have been the main oversight
7 mechanism over GSS investigations.

8 Q. And is it -- is it your understanding that
9 the Attorney General has no independent authority
10 to bring a case of a criminal prosecution against
11 an individual member of the security services or the
12 IDF who engages -- well, let me ask the question again,
13 because I want to limit it just to the General Security
14 Service.

15 Is it your understanding that the Attorney
16 General has no independent authority to open or conduct
17 an investigation of a member of the General Security
18 Service that the Attorney General believes engaged in
19 acts of cruel, inhuman, or --

20 A. Degrading.

21 Q. -- degrading treatment or torture?

22 A. No. I think the Attorney General does have
23 the power to do so. But the policy is not to launch
24 such investigations before a -- this internal procedure
25 that I've described takes place.

1 practice, effective.

2 Q. And I'm -- I understand, you know, you have
3 a perspective about -- it's valuable for society to
4 have a minority view, I think.

5 A. Minorities many times are -- get it right.

6 Q. We -- I'm not sure we're -- it's worth our
7 time or -- or it's the appropriate forum to --

8 A. Yeah.

9 Q. -- debate on that topic.

10 I -- I just -- what I'm asking is: Is there
11 any other official channel, or have we exhausted your
12 knowledge of the official channels for these --

13 A. I don't --

14 Q. -- complaints?

15 A. Let's -- let's -- let's, again, be accurate.

16 You've now mentioned the word "complaint."

17 The Knesset committee is not a place where
18 you can file any complaint. The Attorney General, as
19 I said, has a very clear policy that he will not launch
20 a criminal investigation prior to the -- what you called
21 an inspector -- internal inspector will review the
22 allegation.

23 Basically, the -- the -- the suspect has two
24 channels. One is the controller or the inspector that
25 he can file a written allegation. And in his trial, he

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| <p style="text-align: right;">Page 125</p> <p>1 can raise the issue. These are the two open doors for 2 a -- an -- a suspect that was -- that alleges that he 3 was maltreated in the GSS interrogation.</p> <p>4 Q. And the Bagatz?</p> <p>5 A. Bagatz is a court in which you can ask for 6 an order. What -- the order that you can -- this is 7 a judicial review -- administrative judicial review 8 instance.</p> <p>9 So if one of those -- one of those authorities 10 that I mentioned before does not do their job right, you 11 can go to Bagatz. But you don't complain to the Bagatz 12 or to the High Court of Justice that you were maltreated 13 in -- in the interrogation. What order are you seeking?</p> <p>14 Q. Okay. Fair enough. Thank you for that 15 clarification.</p> <p>16 And -- and I think we got wrapped around the 17 axle of -- by a bad question which had to do -- in which 18 I used the word "complaint" and I didn't mean to. But 19 I did use it. And I think you rightly narrowed your 20 answer based on my question.</p> <p>21 So now my question is: Are there -- well, 22 I want to talk now about unofficial, non-governmental 23 institutions that have the ability to investigate and 24 bring to light allegations of cruel, inhuman, degrading 25 treatment or torture.</p> | <p style="text-align: right;">Page 127</p> <p>1 understand a sample of three sounds sort of antidotal 2 to me.</p> <p>3 A. Just to -- not to -- to make things clear, 4 it was not about torture or degrading treatment. It 5 was just detainee -- Palestinian detainees that wanted 6 to be interviewed and were not permitted.</p> <p>7 Q. Do -- do detainees have the right -- well, 8 do convicted security offenders have the right to visit 9 their family?</p> <p>10 A. To have their family --</p> <p>11 Q. To have their family come to the prison and 12 see them?</p> <p>13 A. Yes.</p> <p>14 Q. And do they have the right to be visited by 15 the International Red Cross?</p> <p>16 A. Yes.</p> <p>17 Q. Are there other non-governmental organizations 18 that come visit with them?</p> <p>19 A. Not that I know of.</p> <p>20 Q. So -- and do they have the right to speak to 21 their counsel?</p> <p>22 A. Absolutely.</p> <p>23 Q. And what recourse does a -- if a client -- 24 a family came to you and said -- said, you know, we 25 have a family member who was convicted of a security</p> |
| <p style="text-align: right;">Page 126</p> <p>1 So does the -- have such allegations appeared 2 in the popular press?</p> <p>3 A. Yes.</p> <p>4 Q. And -- and does the press have adequate access 5 to people who feel that they've been treated cruelly, 6 degradingly, inhumanly, or tortured, that they're able 7 to communicate those assertions?</p> <p>8 A. If they are not in prison.</p> <p>9 Q. And if they are in prison, can they speak 10 to the press?</p> <p>11 A. Not freely.</p> <p>12 Q. What do you mean?</p> <p>13 A. They need the permission of the prison 14 authorities, which is not always given or many times 15 it's not given.</p> <p>16 Q. Do you have either a statistical estimate 17 or directional, based on your experience, of how often 18 detainees are permitted to speak to the press?</p> <p>19 A. In all the cases that I asked for permission 20 for my client to be interviewed, I was denied. It was 21 one or two cases -- two or three cases, not more. So 22 it's not -- it's not representing it. But --</p> <p>23 Q. What about after conviction?</p> <p>24 A. I am talking about after conviction.</p> <p>25 Q. So -- and do you have a sense -- I mean, I</p> | <p style="text-align: right;">Page 128</p> <p>1 crime and his confession was illegally coerced and we'd 2 like to -- we'd like to challenge that, is -- is -- do 3 they have any ability to do that once the trial's been 4 completed?</p> <p>5 A. To challenge that legally or publicly?</p> <p>6 Q. Either one.</p> <p>7 A. Well, publicly, the attorney may -- may 8 himself be interviewed or the family members may be 9 interviewed. But that's not, you know, the press and, 10 rightly, once -- the account of the person involved, 11 not someone who heard.</p> <p>12 Q. Is the press free to report on allegations 13 of torture, cruel, degrading, or inhuman treatment in 14 Israel?</p> <p>15 A. Everything that has to do with the GSS must 16 go through censorship, military censorship. However, 17 the fact is that these allegations have been made in 18 public, in the press, and the censorship has not 19 censured them.</p> <p>20 Q. Okay. What about the Public Committee Against 21 Torture in Israel, is that -- is that an institution 22 that has the ability to investigate charges of --</p> <p>23 A. Okay. So I -- I was -- I omitted -- when 24 you asked me if there are any other non-governmental 25 organizations, indeed Public Committee Against Torture</p> |

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|---|---|
| <p style="text-align: right;">Page 129</p> <p>1 in Israel is sending attorneys to prisoners and -- who 2 get an affidavit from them regarding the way they were 3 treated in custody.</p> <p>4 Q. And -- and just to be fair to you, I don't 5 think you missed it. I don't think I asked it of you 6 yet.</p> <p>7 A. Okay.</p> <p>8 Q. So --</p> <p>9 A. We're fine.</p> <p>10 Q. So, in that regard, would -- would you like 11 to -- I'd like to -- I don't want to take a lunch break 12 quite yet.</p> <p>13 A. Okay.</p> <p>14 Q. But if you'd like to take a short break now, 15 if you're getting tired, I'm -- I'm happy to take a 16 break. Or I'm happy to continue for another 20, 25 17 minutes.</p> <p>18 A. Another 20, 25 minutes is fine.</p> <p>19 Q. Okay.</p> <p>20 MR. HILL: Well, actually, I would like 21 a break. We have been on the record for an hour and 22 35 minutes now.</p> <p>23 MR. YALOWITZ: Okay. So let's take a restroom 24 break --</p> <p>25 THE WITNESS: Sure.</p> | <p style="text-align: right;">Page 131</p> <p>1 A. As I said before, there is censorship. But 2 as I said, there are from time to time such allegations 3 in the Israeli press.</p> <p>4 Q. Thank you.</p> <p>5 And then we described that attorneys are 6 certainly allowed to be told of such activities; right?</p> <p>7 A. Right.</p> <p>8 Q. And -- and the attorneys are free to publicize 9 the facts described by the clients; right?</p> <p>10 A. Again, publishing issues that have to do with 11 the GSS must go through the Israeli military censorship. 12 Nevertheless, as I said before, such allegations have 13 been made publicly.</p> <p>14 Q. Now, then the International Red Cross visits 15 detainees and prisoners; right?</p> <p>16 A. Right.</p> <p>17 Q. And is the International Red Cross subject 18 to censorship?</p> <p>19 A. The International Red Cross never publishes 20 and publicizes any -- any communications that it holds 21 with detainees or with government, State actors.</p> <p>22 Q. I see. Their job is purely humanitarian, 23 to try to solve the problems if they exist?</p> <p>24 A. That's right.</p> <p>25 Q. Now, we also discussed the Public Committee</p> |
| <p style="text-align: right;">Page 130</p> <p>1 MR. YALOWITZ: -- for the convenience of -- 2 THE WITNESS: Everybody. 3 MR. YALOWITZ: -- of all involved. 4 (Recess from 12:06 p.m. to 12:18 p.m.) 5 MR. YALOWITZ: We're back after a short break. 6 Q. BY MR. YALOWITZ: Now, we were talking before 7 the break about unofficial, non-government places or 8 institutions or channels, if you will, for complaints 9 about cruel, degrading, inhuman treatment or torture. 10 So -- so if -- if a person in the custody of 11 the GSS has been subjected to such treatment, he or she 12 is allowed to tell his family; right? 13 A. Allowed to tell the family? 14 Q. Yes. 15 A. Yes, they're allowed. 16 Q. And -- and he or she is allowed to tell his 17 attorney -- right? -- his or her attorney? 18 A. Yes. 19 Q. And I think you describe that the press is 20 free to report on allegations of such behavior; right? 21 A. Right. 22 MR. HILL: Objection. Misstates the 23 testimony. 24 Q. BY MR. YALOWITZ: Okay. Well, let me ask 25 you: Is the press allowed to?</p> | <p style="text-align: right;">Page 132</p> <p>1 Against Torture in Israel. That's a non-government 2 institution that works to prevent torture in Israel, 3 I presume, from its name; is that right?</p> <p>4 A. That's right.</p> <p>5 Q. And does it also work to prevent cruel, 6 degrading, and inhuman treatment, or is that group 7 fine with that particular type of practice?</p> <p>8 A. They were formed to monitor violations of 9 the convention against torture, degrading, and inhumane 10 treatment or punishment.</p> <p>11 Q. I mean, I don't want to quibble about whether 12 something is, quote, unquote, "torture," as opposed to 13 cruel, degrading, or inhumane.</p> <p>14 A. Okay.</p> <p>15 Q. You agree with that; right?</p> <p>16 A. Well, there is a difference as a matter of 17 law. But I agree that all -- all types are -- are 18 illegal.</p> <p>19 Q. In Israel?</p> <p>20 A. In Israel.</p> <p>21 Q. And --</p> <p>22 A. Well, again --</p> <p>23 Q. Subject to the --</p> <p>24 A. Subject to the necessity defense.</p> <p>25 Q. -- necessity defense?</p> |

1 I'm sorry. I interrupted you. You -- you
 2 said --
 3 A. Subject to the necessity defense.
 4 Q. Thank you.
 5 Now, in addition to the public committee,
 6 is -- has Yesh Din been involved in communications with
 7 prisoners or detainees involving potential allegations
 8 of cruel, inhuman, degrading treatment or torture?
 9 A. No.
 10 Q. What about B'Tselem?
 11 A. I'm sure B'Tselem had, in the past, reported
 12 of such matters. But it doesn't do it on a regular
 13 basis.
 14 Q. And -- and is -- is B'Tselem free to report
 15 about these matters? Or is it the same that -- that
 16 they're subject to review, but they've been permitted
 17 to report?
 18 A. The same.
 19 Q. Okay. And is there -- is there sort of like
 20 a friendly rivalry among organizations like B'Tselem,
 21 Yesh Din, Public Committee --
 22 A. Not all the organizations that you've
 23 mentioned deal with the same things. So I don't
 24 think there is a rivalry between some. There is
 25 healthy competition among others. But many times,

1 Q. So are you familiar with a service called
 2 Nevo?
 3 A. Yes.
 4 Q. What is Nevo?
 5 A. It's a legal -- it's a legal database.
 6 Q. And have you checked it for military court
 7 decisions?
 8 A. In the time frame we're dealing with, there
 9 were no military court decisions on Nevo. Maybe
 10 several -- and it's subject to -- to a fee, of course.
 11 Q. So when did military court decisions come
 12 online at Nevo?
 13 A. I am -- I don't know if ever on Nevo --
 14 military court decisions systematically were uploaded
 15 to Nevo. And I don't know when it started.
 16 Q. Do you -- do you know an individual named
 17 Aaron Mishnael?
 18 A. I certainly do.
 19 Q. And did he serve for a period of time in the
 20 Military Court of Appeals?
 21 A. Yes. Not in the time frame relevant to my
 22 report.
 23 Q. Do you know when he joined that court?
 24 A. Several years ago.
 25 Q. Do you know how many of his opinions are on

1 there are collaborations and fighting petitions
 2 together.
 3 Q. So is there both collaboration and healthy
 4 competition in the area of -- of reporting on and
 5 working to prevent cruel, degrading, inhuman treatment
 6 and torture?
 7 MR. HILL: Objection. Vague.
 8 THE WITNESS: Between --
 9 MR. HILL: But he can respond.
 10 THE WITNESS: Between whom?
 11 Q. BY MR. YALOWITZ: Amongst non-governmental
 12 organizations like B'Tselem, Yesh Din, the Public
 13 Committee Against Torture in Israel.
 14 A. As I said, Yesh Din doesn't deal with this
 15 matter. And regarding the others, I haven't been
 16 involved in their work in the last few years. So
 17 I wouldn't know.
 18 Q. Have -- have we now spoken about all of the
 19 non-governmental channels that you're aware of in which
 20 allegations of cruel, degrading, or inhuman treatment
 21 or torture can be raised?
 22 A. I -- I think so.
 23 Q. Okay. Now, I want to come back and ask you
 24 about -- about reporting of military court decisions.
 25 A. Yeah.

1 Nevo?
 2 A. Today? No.
 3 Q. If -- if it were represented to me that there
 4 are 700 such decisions authored by Judge Mishnael, would
 5 that sound reasonable to you, on Nevo?
 6 A. I will have to check that. But I know that
 7 Judge Nevo [sic] has also served for many years as a
 8 judge in the military court for soldiers. And I -- and
 9 it has to be made clear that these are judgments in the
 10 West Bank court, not in Israel proper. But I will have
 11 to check that.
 12 Q. Okay. I think you meant Judge Mishnael. I
 13 think you said Judge Nevo, but that was just a --
 14 A. So no.
 15 Q. That was just a -- that was just a --
 16 A. Judge Mishnael definitely.
 17 Q. Okay. And I -- I didn't say that to embarrass
 18 you. I just said it so that it would be clear for our
 19 transcript.
 20 A. That's clear.
 21 Q. Okay. Now -- oh, I also wanted to ask you
 22 about administrative detention because I just want to
 23 make sure we're together on this.
 24 Are you aware that administrative detention
 25 is a law enforcement tool that is used in Israel against

1 civilians?

2 A. Extremely rarely. There is a -- there is
3 a power to do so. And I would say that the last time
4 it was used -- I might be wrong -- was after the Rabin
5 assassination.

6 Q. So are you familiar with an individual named
7 Noam Federman?

8 A. Yes.

9 Q. When was Mr. Federman detained?

10 A. 2007 or so.

11 Q. And -- and are you familiar with the decisions
12 of the District Court in Jerusalem that addressed the
13 propriety of his detention?

14 A. I didn't -- I didn't read it. But I was
15 under the impression that he was -- that he was
16 administratively detained according to the laws of
17 the West Bank rather than the laws of Israel. But I --
18 again, I might be wrong. If you show me the judgment,
19 the ruling, I will address it.

20 Q. I may come back to you on that.

21 A. Okay.

22 Q. But I don't have it just right in front of
23 me or I would.

24 A. But, nevertheless, the -- the -- the use of --
25 wait.

1 Did you say that Noam Federman was
2 administratively detained?

3 Q. That's -- that's my question to you.

4 A. I think he was not.

5 Q. Okay.

6 A. Okay.

7 Q. Do you --

8 A. So there was no administrative detention
9 order against -- issued against Mr. Federman.

10 Q. As far as you're aware?

11 A. There was an administrative restriction
12 order issued against him, not detention. As far as
13 I remember, the last time administrative detention in
14 Israel took place was in 1995.

15 Q. And what -- what -- what do you know about
16 Noam Federman? What kind of an individual is he? Why
17 would -- why would he be administratively restricted
18 or detained?

19 MR. HILL: Objection. Compound.

20 But the witness can answer.

21 MR. YALOWITZ: Do you want me to say it again?
22 It was a lot of questions.

23 MR. HILL: No, no. It was just several at
24 once.

25 The witness can respond.

1 MR. YALOWITZ: Okay.

2 THE WITNESS: Noam Federman is a resident of
3 Kiryat Arba, I think, a settlement near -- near Hebron.
4 He's a member -- he was a member of the party Kach,
5 which was Meir Kahane's party that later on was
6 pronounced illegal. And he's a right-wing extremist.

7 Q. BY MR. YALOWITZ: He's a right-wing extremist?

8 A. Yeah.

9 Q. So in your judgment, would it be appropriate
10 for the State of Israel to restrict or detain such an
11 individual?

12 A. Administratively?

13 Q. Yes.

14 A. No.

15 Q. You think that he should be prosecuted
16 criminally or left to his own devices?

17 A. Absolutely.

18 Q. Even if he poses a security risk?

19 A. I think that he should not be in the West
20 Bank, like I think the rest of those settlers that
21 live in the West Bank should not be there, should be
22 in Israel. But if there are any suspicions against
23 Mr. Federman, they have to be pronounced, investigated,
24 charged according to the safeguards in criminal law.

25 Q. We -- I noticed, in your report, that you

1 were critical of the military court system as being
2 the product of a non-democratic regime.

3 Do I have that right?

4 A. Yeah.

5 Q. And do you think that the fact -- and I --
6 I take it you're not -- well, I take it you are of
7 that view because it is the product of a military
8 regime?

9 Do I have that right?

10 A. You have that right.

11 Q. And is it your view that it is impossible
12 for a person -- for a -- for a person who is not a
13 soldier in the military of which the military court
14 is a -- let me start over.

15 Okay. Let me ask you a -- let me do it in
16 a hypothetical. Okay. No, no, I won't do that either.
17 We were on such a good roll until the break, weren't we?

18 All right. Now, is it your view that a --
19 that a person is deprived of due process merely
20 by virtue of the fact that he or she is tried in a
21 military court when he or she is not in the military
22 that established that court?

23 A. Not as a blanket assertion, no.

24 Q. So now let me give you my hypothetical.

25 A. Okay.

1 Q. Okay. So imagine the year is 1942. And
 2 eight German soldiers sneak into the United States
 3 to perform acts of sabotage. And they are -- they
 4 are not in uniform. They're in civilian clothing.
 5 And the United States authorities catch them.

6 Would it be inconsistent with due process,
 7 in your mind, for those individuals to be tried in
 8 a U.S. military court-martial?

9 MR. HILL: Objection.

10 MR. YALOWITZ: I guess that's a --

11 MR. HILL: Incomplete hypothetical.

12 The witness can respond.

13 Q. BY MR. YALOWITZ: I guess it's also redundant.

14 But --

15 A. Look, I think I'm not in a position to answer
 16 this question because I haven't looked into the legal
 17 and moral traits of the circumstances you've described.

18 We're dealing with a court that applies
 19 jurisdiction over an occupied territory, an occupied
 20 people, occupied people for -- for five decades almost.
 21 This is completely different than the question of who
 22 is supposed to try saboteurs that infiltrated your own
 23 jurisdiction. And that question is important as well,
 24 I agree. But I -- I didn't -- I didn't delve into it,
 25 and I didn't think it over. I know -- I know the case

1 forth.

2 MR. YALOWITZ: Okay.

3 MR. HILL: So that's my foundational objection
 4 to the question: "You've reviewed the complete file?"

5 MR. YALOWITZ: I see. All right.

6 Q. BY MR. YALOWITZ: Other than the -- there --
 7 there -- were two documents that -- you were at
 8 Mr. Kaufman's deposition; right?

9 A. Yes, I have [sic].

10 Q. And you noticed that there were two documents
 11 that were exhibited that had some missing pages and some
 12 mixed up -- one had missing pages and one had missing
 13 and mixed-up pages; right?

14 A. Right.

15 MR. SATIN: Objection. Misstates the
 16 evidence.

17 MR. YALOWITZ: How many lawyers are going
 18 to be objecting here?

19 MR. SATIN: I guess two.

20 MR. HILL: However many it takes.

21 MR. YALOWITZ: All right. Well, two on one,
 22 that's getting close to an even match. We'll see.

23 Q. BY MR. YALOWITZ: So other than those two
 24 documents, did you notice anything that, on its face,
 25 was -- appeared missing or incomplete?

1 you're referring to. I don't have a crystalized view
 2 on that matter.

3 Q. Fair enough. That's helpful.

4 Okay. I want to come now to the topic of
 5 actual innocence. And I -- I want to focus on the
 6 21 cases that you and Mr. Kaufman studied.

7 So you reviewed all of the files of the
 8 21 convicted individuals; right?

9 A. Yes.

10 MR. HILL: Objection. Lack of foundation.

11 MR. YALOWITZ: I don't understand the
 12 objection.

13 MR. HILL: Well, I think we've already
 14 established that the material that was provided
 15 to the defendants is not the complete file. And
 16 so to the extent your foundation for the question
 17 is that the complete files were provided to us and
 18 then provided to Mr. Sfard, that's the failure of
 19 foundation.

20 MR. YALOWITZ: What do you mean?

21 MR. HILL: Well, we established at the
 22 deposition of Mr. Kaufman that there were missing
 23 pages from --

24 MR. YALOWITZ: Aah.

25 MR. HILL: -- the files and so on and so

1 A. There's a huge amount of material that is
 2 missing, including -- for example, just out of my mind,
 3 in Case No. 7, the whole transcript of the testimony
 4 of the GSS investigators is not -- is not included in --
 5 in the material that was passed to us.

6 There are many, many pieces of material that
 7 I would expect to see in a military court file and is
 8 not there. And I don't know whether it's not there
 9 because it was never there or because it was not copied.
 10 So as I wrote in my report, this is a very partial --
 11 these are very partial files.

12 And to add to that, that we don't have the
 13 GSS files, which is the -- as I said, the flesh and
 14 blood of -- of -- of the cases.

15 Q. Did -- did you hear Mr. Kaufman testify that
 16 he went to the military court and compared the files he
 17 had received from counsel for the plaintiffs with the
 18 court's in -- with the files in the court record?

19 A. I did hear, and I was astonished. Because,
 20 when I wanted to review transcripts of military court
 21 files, I had to file a High Court petition. Because
 22 the military court would not allow me -- not in this
 23 case.

24 But when we've worked on the Yesh Din file,
 25 we asked to review some transcripts. And they just

1 wouldn't -- the court would not allow us to review
 2 the files. We had to file a High Court petition in
 3 order to get a permit to review transcripts. But I
 4 did hear Mr. Kaufman that he has equated the cases --
 5 the -- the court files with -- with the copies that
 6 he has received.

7 Q. Do you believe him?

8 A. Of course I believe him.

9 Q. And did you make an effort to do that as well?
 10 Or did you assume, from your prior experience, that it
 11 would be futile?

12 A. I assumed that I would have to file another
 13 High Court petition if I would want to see those files.

14 Q. And did you -- I think I asked you this, but
 15 let me make sure I've got it. I'll just ask it all
 16 at once so you can not answer, or your counsel might
 17 object. [sic]

18 But did you speak with, in any of the 21
 19 cases, any of the defense lawyers, prosecutors, judges,
 20 or defendants to ask about any information about those
 21 cases?

22 A. I have not spoken to any of these -- of those.

23 Q. Okay. Did you read any other documents about
 24 the 21 cases that were not in those files?

25 A. No.

1 Q. So you didn't read any documents that were
 2 attached to the report of Alon Eviatar?

3 Do you know who Alon Eviatar is?

4 A. I know who Alon Eviatar is. I'm trying to
 5 figure out what were the attachments. But I think I
 6 didn't. So --

7 Q. And do you know who Israel Shrenzel is?

8 A. I do.

9 Q. Did you read his report?

10 A. I glanced through his report. I didn't read
 11 it word by word.

12 Q. Did you read any of the attachments to his
 13 report?

14 A. No.

15 Q. Okay. Now, I want to ask you a very precise
 16 question. I want you to listen to it very carefully.
 17 Not that you -- I mean, you've been very careful.
 18 I'm not -- it's not a criticism.

19 But I want to know if you believe, to a
 20 reasonable degree of certainty, that any of the 21
 21 people who were convicted of the crimes that we're
 22 talking about here today are actually innocent?

23 A. I cannot have any informed opinion about
 24 your question.

25 MR. YALOWITZ: Okay. It would be a convenient

1 time for me to break.

2 MR. HILL: Let's take our lunch break.

3 MR. YALOWITZ: Okay.

4 (Recess from 12:40 p.m. to 1:43 p.m.)

5 Q. BY MR. YALOWITZ: We're back.

6 Mr. Sfard, are you familiar with a printed
 7 book that collects decisions of the military court
 8 which is published annually?

9 A. I know of it. When we prepared the Yesh
 10 Din report, we didn't find it in -- in the library
 11 that we checked.

12 Q. What's it called?

13 A. "Selected Judgments From the Military Courts."

14 Q. "Piskei din" or something like that?

15 A. Judgment -- "piskei din" is "judgments."
 16 Selected -- if I'm not mistaken, it's only judgments
 17 from the appeals court.

18 Q. That -- that would be the precedential kind?

19 A. Yes.

20 Q. Now, I -- I also was curious about one thing
 21 about your -- your views about the State of Israel from
 22 the territorial perspective.

23 There -- there are -- as it's been described
 24 to me, there are people who believe that from the
 25 Jordan River to the Mediterranean Sea should be owned

1 by Jews. And there are people who believe that from
 2 the Jordan River to the Mediterranean Sea should be
 3 owned by Muslims. And there are people who believe
 4 that there must be some form of coexistence.

5 So which do you categorize yourself as?

6 A. I categorize myself in -- as someone who
 7 believes that, between the Jordan River and the sea,
 8 there's supposed to be two states --

9 Q. And --

10 A. -- living in peace and coexistence, preferably
 11 with open borders.

12 Q. And do you -- do you agree that within the
 13 '67 borders is sovereign territory of Israel?

14 MR. HILL: Objection. Vague.

15 Which '67 borders are we talking about?

16 Q. BY MR. YALOWITZ: I'm sorry. Within the
 17 pre-'67 borders.

18 Thank you for the --

19 A. Yes.

20 Q. -- heads-up there.

21 A. Yes.

22 Q. So let me just ask it again --

23 A. Okay.

24 Q. -- just so we have it, just to make sure

25 I understand it.

1 Are you of the belief that, within the
 2 pre-1967 borders, the State of Israel is sovereign?
 3 A. Yes.

4 Q. Now, are you familiar with a requirement
 5 that the GSS report to the Knesset annually the
 6 number of cases in which a GSS investigator invokes
 7 the necessity defense?

8 A. I'm not sure. I -- I don't remember if --
 9 it sounds like something that is there. But I'm not
 10 sure. I'm not positive.

11 Q. And so, then, I take it you wouldn't know
 12 whether such a report is publicly available or not?

13 A. I don't think there -- I mean, even if there
 14 is such a demand, it's not public.

15 Q. Okay. As far as you know?

16 A. As far as I know.

17 Q. Now, I want to turn now to the specific
 18 process afforded to the 21 individuals who were
 19 convicted of the killings that took place in our case.

20 MR. HILL: Objection. Misstates the record.
 21 Go ahead.

22 Q. BY MR. YALOWITZ: You -- you examined
 23 those and commented on some of the convictions in
 24 your report; right?

25 A. I didn't really comment on their convictions

1 in my report. I made some comments regarding due
 2 process issues that I -- that are common in the 21
 3 files. But since then, I reviewed them more closely.
 4 And if you want to go over them and see what kind of
 5 due process issues and problems they raise, I'm willing
 6 to do so.

7 Q. Thank you.

8 And you have the files that the plaintiffs
 9 provided to the defendants? I think I noticed, when
 10 we were together last time, you had them accessible
 11 on your iPad?

12 A. No, I don't have them accessible on my iPad.
 13 Last time we've been in Kaufman's deposition, it was
 14 accessible on Mr. Hill's iPad.

15 Q. Okay.

16 A. I have it only in -- in a physical form.

17 Q. Do you -- do you have it with you?

18 A. I do.

19 Q. So if, at any time during our conversation,
 20 you would like to refer to something that's in your
 21 physical files, please feel free to do so.

22 A. I will.

23 Q. Now -- now -- and also please feel free
 24 to refer to your report.

25 A. Okay.

1 Q. Now, I'm going to ask you again a very
 2 specific question. And if you would just give me
 3 the answer to the specific question, and then we can
 4 discuss the answer.

5 But I just want to start with a very specific
 6 question, which is: Based on the evidence that you have
 7 reviewed pertaining specifically to the case of Moonzer
 8 Mahmood Halil Nur --

9 A. Yeah.

10 Q. -- do you believe, to a reasonable degree of
 11 certainty, that Mr. Nur was denied due process of law?

12 A. Okay. As I wrote in my report, as I said I
 13 think here, I have been -- I have received only a very
 14 small part of the relevant material to all of the cases,
 15 including Mr. -- Mr. Nur's case. So it is difficult
 16 for me to provide an assessment regarding the -- the
 17 overall due process that he has received.

18 However, from my review of his file,
 19 I understand that he was convicted based on his
 20 out-of-court testimonies, out-of-court statements
 21 that were filed, admitted with the court, without
 22 any objection by the defense and with corroboration
 23 of out-of-court statements made by alleged accomplices
 24 that were also filed with consent of the defense without
 25 cross-examination. I can see that he was detained from

1 April 17th, 2002, in pre-trial detention, pre-indictment
 2 detention, until June 25th, 2002. That's almost two
 3 and a half months.

4 Q. Are you -- are you referring to your report?

5 A. No, I'm -- these are notes that I made
 6 while reviewing different cases. So I'm -- instead of,
 7 you know, every detail looking into the case, I have
 8 summations that I made of these points.

9 Q. Would -- would it be possible for us to pause
 10 and have a copy so we can look at them together?

11 MR. HILL: Sure.

12 THE WITNESS: Absolutely.

13 MR. YALOWITZ: Thank you so much. So why
 14 don't we -- why don't we do that.

15 MR. HILL: You want to go off the record?

16 MR. YALOWITZ: Sure. Thank you.

17 (Recess from 1:51 p.m. to 1:52 p.m.)

18 Q. BY MR. YALOWITZ: Actually, why don't
 19 we go back on the record and try a little different
 20 question. And it may be impossible for you to
 21 answer the question. If it's impossible, then
 22 we'll just pause until we get the notes back. But
 23 let me ask you -- and I -- I appreciate your answer,
 24 and I do want to explore those comments with you.
 25 But what I'd like to begin with is a specific

1 question. So let me say it again. And if you can --
 2 and you may not be able to answer the question. But
 3 if you can, it would be helpful, which is: Based on
 4 the evidence you have reviewed, pertaining specifically
 5 to Mr. Nur's case, do you believe, to a reasonable --
 6 reasonable degree of certainty, that Mr. Nur was
 7 denied due process?

8 A. According to the material that I have, there
 9 is a reasonable degree of certainty that Mr. Nur --
 10 Mr. Nur's investigation and trial have been infected
 11 with due process failures.

12 Q. Okay.

13 A. However, I do not have the full material.
 14 And it might be that, in the full material, there will
 15 be some documents that suggest that some due process
 16 rights failures were even greater than I think or that
 17 some of the things that are under suspicion for due
 18 process issues have actually been repaired.

19 So I'm saying this as a -- I'm very careful,
 20 and I'm very accurate about what I'm saying. My review
 21 of Mr. Nur's case shows that there are due process --
 22 grave due process issues.

23 Q. And you believe that to a reasonable degree
 24 of certainty?

25 A. I'll give you an example, and this is how

1 I think we can proceed.

2 It seems to me that Mr. Nur was denied access
 3 to a lawyer. I do not know that for sure because I do
 4 not have the GSS file and I do not have the denial of
 5 a client/attorney meeting order in front of me.

6 Q. So I just -- and I appreciate your answers.
 7 And I do want to get into the specifics, particularly
 8 once we have your notes back so that you can refer
 9 to them.

10 A. Yeah.

11 Q. My question is -- is sort of the ultimate
 12 conclusion, which is: Based on the evidence that you
 13 have reviewed, specifically relating to Mr. Nur's case,
 14 have you concluded, to a reasonable degree of certainty,
 15 that Mr. Nur was actually denied due process of law?

16 A. I will have to repeat what I said before.

17 I believe, according to the material that
 18 I have, that in Mr. Nur's trial and investigation,
 19 there were due process failures. And I cannot say
 20 that for certainty because I do not have the full
 21 material. However, some of the issues are definite.
 22 And that is -- when I'll get back my notes, I can
 23 list them for you. And some of them are -- let's
 24 call them under suspicion.

25 Q. Okay. So I want to explore that with you.

1 But I think, in fairness to you, we need your notes
 2 back.

3 A. Okay.

4 Q. So --

5 A. We will wait for that.

6 Q. -- we'll wait off the record.

7 (Brief discussion held off the record.)

8 Q. BY MR. YALOWITZ: Mr. Sfard, while we were
 9 off the record, we had one copy of your notes made.
 10 And with your permission, we could mark yours as
 11 the official court copy, and then you'll get a --

12 A. Confiscated?

13 Q. It's just in temporary detention.

14 A. Okay.

15 MS. WEISER: Administrative even.

16 Q. BY MR. YALOWITZ: You'll get a copy back --
 17 A. Okay.

18 Q. -- as soon as your counsel gets it from
 19 Brenda. So we'll mark it as Plaintiffs' 117.

20 MR. HILL: So the -- the witness may have
 21 changed the page order. You should put them back in
 22 the original order and have them marked in that fashion.

23 THE WITNESS: Sorry?

24 MR. YALOWITZ: Let's just check and make sure
 25 that the pages are in the correct order.

1 MR. HILL: So Kent, just to assist you, the
 2 first page is the --

3 THE WITNESS: Yeah.

4 MR. HILL: -- table of contents.

5 (Plaintiffs' Exhibit 117 marked.)

6 Q. BY MR. YALOWITZ: Okay. So do you have
 7 Plaintiffs' 117 before you now?

8 A. Sorry? (Examining.) Yeah, 117.

9 Q. All right. And these are notes that you
 10 prepared in anticipation of today's testimony; is
 11 that correct?

12 A. Yeah.

13 Q. Did you also prepare them to assist in the
 14 examination of Mr. Kaufman?

15 A. No. I made them -- I began making them when
 16 I prepared my own report. And I finished them after
 17 that. Yeah.

18 Q. Did you use these to help with the examination
 19 of Mr. Kaufman?

20 A. I have -- I had -- I had them during his
 21 deposition.

22 Q. Now -- okay. You were going to tell me --
 23 and I'm sorry. I just have one more question about
 24 the notes.

25 You -- these -- these assisted you also in

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1 the preparation of your report or a portion of these,
 2 something like that?

3 A. A portion of these. I -- I didn't manage to
 4 review as -- in full before writing the report. I mean,
 5 I have went through the files. But I haven't managed
 6 to write down all this. I began doing that before the
 7 report was completed and ended after.

8 Q. So -- so the -- your opinions, sitting here
 9 today, are more fully formed than they were when you
 10 prepared the report?

11 Do I have that right?

12 A. In the sense of the details of every case
 13 and case. [sic]

14 Q. Okay. That's helpful. Thank you.

15 Now, you were going to tell me about the
 16 due process issues that you perceived in Mr. Nur's case.
 17 So if you could describe the first one, that would be
 18 helpful. If we take it in small bites, perhaps it
 19 might be better.

20 A. So he was arrested in April -- 17 April of
 21 2002. And the indictment was filed on June 25th, 2002.
 22 That means that he was in pre-indictment interrogation,
 23 detention for more than two months, two months and
 24 a week. And we have no -- we have no documents from
 25 that period of time. It's a very long period of time,

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1 two months and a week.

2 From my experience and from the research that
 3 I was involved in, I have to infer, as did Mr. Kaufman
 4 in his deposition, that he was denied access to a
 5 lawyer. I don't know for how long. Maybe a few days.
 6 It may be weeks. He was probably not permitted to see
 7 anyone from the outer world. And it -- it is more than
 8 possible that a gag order, prohibiting any publication
 9 of the matter of his arrest, was issued.

10 Again, these are things that I do not know
 11 for sure. But this is the regular practice in such
 12 cases. His trial took place indeed. But there was no
 13 evidence phase whatsoever in the sentence that -- there
 14 were no evidential hearings, no cross-examinations.

15 I refer you to the document that is marked
 16 as Bate P 11-1 to 127, which is a request to -- for
 17 extension of his detention beyond two years that
 18 was filed with the Military Court of Appeals. And
 19 in that document, the military prosecution details
 20 the happenings of Nur's trial. And according to
 21 these details, every hearing that was scheduled ended
 22 up with -- in -- as scheduled to hear a witness, a
 23 prosecution witness, ended up with the out-of-court
 24 statements of the witness admitted with consent of
 25 the defense to the court so that one, two, three, four,

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1 five different chunks of the out-of-court material was
 2 admitted. And at the end, the defense waived its right
 3 for -- to -- to hold the defense in the sense that the
 4 defendant did not take the stand.

5 There were several occasions where the
 6 defense attorney has not appeared in trial. Eventually,
 7 the -- and -- and what I can say about the conduct
 8 of the defense in that case is that it looks like
 9 a practice that I've encountered more than once in
 10 the military courts. And that is a strategy -- a
 11 strategy that is based on getting a plea bargain with
 12 the prosecution and is faced with the problem of having
 13 hearings scheduled with -- before the negotiations are
 14 fruitful.

15 What happens in these cases many times --
 16 and I saw it in several of the cases that I've been
 17 reviewing -- that the defense, in order to get a
 18 continuance to keep on negotiating, is -- waives
 19 its rights to cross-examine the witness and instead
 20 consents to the admission of the out-of-court statement
 21 so that it will have more time -- will buy time to
 22 negotiate a plea bargain with the prosecution.

23 Q. So this was a strategy that Mr. Nur was
 24 pursuing in the case before you, as far as --

25 A. I --

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1 Q. -- you're inferring? I mean, you -- you
 2 didn't speak to the lawyer?

3 A. Exactly. I'm inferring.

4 In many of the cases we have before us,
 5 the court file consists of out-of-court investigating
 6 material that was admitted in chunks without any
 7 cross-examination in consent. And the reason why
 8 it was admitted in -- in installments rather than in --
 9 in one go is because every time the defense is facing
 10 with a hearing scheduled, in order to get a continuance,
 11 it is compelled to agree to file the -- to admit the --
 12 the out-of-court statements of the witness that is
 13 supposed to take the stand.

14 Q. Did you notice, in the case of Mr. Nur, any
 15 instance in which his counsel said "I would like to
 16 cross-examine a witness"?

17 A. No. And we will not see that in other cases.

18 Q. Okay.

19 A. What we see is a defense that -- that is
 20 doing very little.

21 Q. Did you see any circumstances, in the Nur
 22 case, in which Mr. Nur's counsel was denied by the
 23 court a request to cross-examine?

24 A. As I said, I did not see that.

25 Q. And did you see, in Mr. Nur's case, any

1 situation in which his counsel complained that there
 2 was evidence he wanted to bring to the court's attention
 3 that he was not permitted to submit?

4 A. I did not see that.

5 Q. Did you see, in Mr. Nur's case, any evidence
 6 that led you to believe he didn't have notice of the
 7 charges against him?

8 A. I have not seen a -- an indictment in Arabic.
 9 I do not know the defendant's attorney. But it is
 10 reasonable to assume that -- that he is -- is not as
 11 good in Hebrew as a native Hebrew speaker. And I have
 12 no -- I -- and I don't know what was the quality of
 13 translation that was provided of the indictment to
 14 Mr. Nur. I don't know.

15 Q. So -- so I guess, among the answers of "yes,
 16 I saw such evidence," "no, I didn't," or "I can't reach
 17 a conclusion," you would pick "C," "I can't reach a
 18 conclusion"?

19 A. Yes.

20 Q. Now, did you -- did you notice that Mr. Nur
 21 was convicted of attempted homicide and acquitted of
 22 kidnapping?

23 A. Yes.

24 Q. Did you notice that he appealed his sentence?

25 A. Yes.

1 Q. The prosecution also appealed the sentence;
 2 is that right?

3 A. I don't remember by heart. But I take your
 4 word for it.

5 Q. Well, I'm -- I'm asking a question based on
 6 Mr. Kaufman's summary. But --

7 A. Yeah.

8 Q. But --

9 A. I can see -- I can see that he has appealed,
 10 an appeal of one page, one and -- and a third with --
 11 he appealed both the -- his -- he appealed both the
 12 sentence and the fact that he was convicted -- and
 13 the conviction.

14 Q. Well, what is the standard of review in the
 15 Military Court of Appeals?

16 A. Standard of review?

17 Q. Yeah. So do they -- is it de novo, or
 18 they review them for clear error? What -- what's
 19 the standard that they apply in reviewing a judgment
 20 of a lower court?

21 MR. HILL: Objection. Lack of foundation.
 22 I'm not sure the witness understands the --

23 MR. YALOWITZ: Sure.

24 MR. HILL: -- terms you've just used.

25 Q. BY MR. YALOWITZ: Do you understand -- do you

1 understand the question I've asked?

2 A. I understand. I do not -- I do not know
 3 the -- the tests that you've provided. I know that
 4 in the Military Court of Appeals, like in -- in
 5 an appellate court in civilian courts, the -- the court
 6 will adjudicate mainly mistakes of law and, in very
 7 rare cases, mistakes of fact.

8 Q. What record does the Military Court of
 9 Appeals have in making its review?

10 A. What do you mean "what record"?

11 Q. So as a counsel for a client who's been
 12 convicted of a crime in the military court and you
 13 wish to make an appeal, you write a brief?

14 A. Uh-huh.

15 Q. Is that right?

16 A. Yeah.

17 Q. And then -- and then you submit documents
 18 showing what happened in the lower court; right?

19 A. You submit the writ of appeal with -- and --
 20 and the file from the lower court. You send it over
 21 to the appellate court.

22 Q. So the appellate judges have not only the
 23 brief itself, but they have whatever file was created
 24 in the trial court?

25 A. Yeah.

1 Q. Having had a chance to review the file --
 2 well, have you had a chance to review the file as
 3 well as your notes and your report from July of this
 4 year on the topic of Mr. Nur?

5 A. Here?

6 Q. Yes.

7 A. If I have anything to add?

8 Q. I was going to ask you next --

9 A. Okay.

10 Q. -- if you had anything to add.

11 A. So let me just make -- look it over.

12 Q. Sure.

13 MR. HILL: And just so the question is clear,
 14 you want him to add what? Additional due process issues
 15 he hasn't told you about yet or something different?

16 MR. YALOWITZ: Well, the first question is:
 17 Has he had a chance to review all that?

18 MR. HILL: All right.

19 MR. YALOWITZ: And he's now reviewing it,
 20 and then I can --

21 MR. HILL: Fine.

22 MR. YALOWITZ: -- ask him questions after
 23 he's had that opportunity.

24 MR. HILL: Fine.

25 THE WITNESS: (Examining.) Yeah. Let me

1 just add that we do not have, in this case, as I said,
 2 the GSS memorandums and the file, the detention hearing
 3 meetings -- minutes -- sorry -- all the interrogation
 4 documents. We have only out-of-court -- only custody
 5 statements. We have nothing other than that, not the
 6 gag orders, not the client-attorney prevention orders.

7 We do not have any immunity certificate to
 8 withhold disclosure of evidence, which I'm sure was
 9 issued. Or if not issued, then -- then it's another
 10 problem. And we -- for some reason, we didn't -- I
 11 didn't find defense summations. So I don't know if
 12 the defense waived its rights for summations or we
 13 just don't have it.

14 Q. BY MR. YALOWITZ: Mr. Kaufman reports in
 15 his report -- I'll just read it to you.

16 A. Okay.

17 Q. (Reading.)

18 "Comprehensive" --

19 He's speaking of Mr. Nur, of the case of
 20 Mr. Nur.

21 A. Yeah.

22 Q. He says:

23 "Comprehensive legal arguments were made
 24 that the accused's statements did not make out a
 25 guilty state of mind (apart from the offense of

1 failing to prevent the commission of a crime)."'

2 Does that refresh your memory that legal
 3 arguments were made to the court?

4 A. I -- I do not have this. It may be that
 5 he inferred that from the judgment, from the ruling
 6 of the court, which might have said what the defense
 7 has argued. No, I don't see any -- any reference
 8 in the judgment to defense summations or to defense
 9 argumentation. It might be that I didn't -- that
 10 I missed something. But I don't see it.

11 I want to add, though, that -- sorry.

12 I forgot what I wanted to say. Go on.

13 Aah, can I add something?

14 Q. Of course.

15 A. The police custody statements that Mr. Nur
 16 made were recorded in Hebrew. And he signed on
 17 a Hebrew version of them. And that raises another
 18 due process issue. He signed them at the end of his
 19 April 23rd, 2002, statement, mind you a week after he
 20 was detained. It says -- and I inter -- I translate
 21 to English:

22 (Reading/translating.)

23 "This is my statement that was read out to
 24 me and -- and translated to Arabic orally."

25 So it is clear to me that Mr. Nur does not

1 master Hebrew. And yet -- and I'm sure that he -- I'm
 2 sure -- it seems reasonable that he was interrogated
 3 in Arabic, but his statement was recorded in Hebrew.
 4 And that is a problem.

5 Q. And just so the record is clear, because I
 6 think we all understood each other in the room. But
 7 when you said "I'm sure" and then you said "I'm sure"
 8 again, what you meant was you're actually not sure --

9 A. Let's --

10 Q. -- and you're making an inference?

11 A. Let's say -- let's put it that way. If he
 12 was interrogated in Hebrew, then we have even a bigger
 13 problem. So I, for the benefit of the doubt, that
 14 the GSS interrogators or the police officer in this --
 15 in -- in the police custody statement has not done
 16 something and invented completely the interview --
 17 the interview was conducted in Arabic, but recorded
 18 in Hebrew, without being documented by video or audio
 19 so that we can retro -- in retrospect, make sure that
 20 indeed what -- the things that are attributed to Mr. Nur
 21 he indeed said.

22 Q. Did Mr. Nur's counsel, at the trial, ever make
 23 a claim that his custodial statements were inaccurate?

24 A. Not only that he didn't, he consented to its
 25 admission in court.

1 Q. And -- and do you think that the strategy
 2 that Mr. Nur's counsel pursued -- well, let me withdraw
 3 that question.

4 Is there anything else in the record that
 5 you've seen that you wish to highlight as either a
 6 definite or an under suspicion due process problem?

7 A. No.

8 Q. And when you mentioned the absence of the
 9 GSS files and the absence of an immunity certificate,
 10 would you categorize those as definite due process
 11 problems or under suspicion due process problems?

12 A. If counsel for the defendant did not ask
 13 for the GSS file, did not get it, did not receive it,
 14 and kept on managing, litigating the case without
 15 the memorandums from the GSS interrogation, that
 16 is a definite due process issue that -- because
 17 counsel has provided ineffective representation.

18 Q. Okay. So I don't want you to speculate
 19 or engage in hypotheticals here. We're talking about
 20 the evidence before you.

21 A. I don't -- I don't know if the defendant
 22 lawyer has asked for -- for the -- for those documents
 23 and whether he received them.

24 Q. So we talked about GSS files earlier in your
 25 deposition.

1 You remember that?
 2 A. We have.
 3 Q. And -- and you said that you knew about the
 4 existence of such files before you were even admitted
 5 to the Bar; right?
 6 A. Yes.
 7 Q. You said it's common knowledge for lawyers
 8 who practice in the military courts to be aware of
 9 files like that; correct?
 10 A. Correct.
 11 Q. And you said that, in order to request them,
 12 you don't make a file in the court; right?
 13 A. No.
 14 Q. "No" meaning I'm correct?
 15 A. You're right.
 16 Q. And you said that when they're provided,
 17 the prosecutor doesn't make a filing in the court
 18 showing that he provided them; right?
 19 A. Absolutely.
 20 Q. Okay. Is there anything else about the
 21 Nur case that you consider to be a denial, in whole
 22 or in part, of Mr. Nur's due process rights?
 23 A. Okay. My answer to you will -- my following
 24 answer will be correct for if we'll talk about other
 25 cases and when you'll ask me if I have more due process

1 issues.
 2 I do not have more due process issues to
 3 raise except those general due process issues that are
 4 the traits of the military court system as described in
 5 my report, interpretation, translation, public hearing,
 6 and so on and so forth. I don't want to miss any of
 7 them, but those are listed in my report.
 8 Q. And what I would like you to do is feel free
 9 to refer to your report at any time. And if there is
 10 an issue such as translation or public hearing, as to
 11 which there is specific evidence about one of the 21,
 12 you should include that in our discussion.
 13 So, for example, I think I asked you
 14 earlier -- well, let me stop there and say: Is
 15 that agreeable to you?
 16 A. I didn't understand what you said.
 17 Q. Okay. So you and I spoke earlier about
 18 the issue of interpretation?
 19 A. Right.
 20 Q. And I asked you, in any of the 21 files, was
 21 there a request to change interpreters; right? I think
 22 I asked you that.
 23 A. You did.
 24 Q. And you said you didn't think so; right?
 25 A. I didn't see any such request.

1 Q. Right. And then -- and then I -- if I didn't
 2 ask you, I'll ask you now: Did you see in any of the
 3 21 files any --
 4 A. Complaint.
 5 Q. -- complaint that the translator wasn't --
 6 that the interpreter wasn't doing what he or she was
 7 supposed to do?
 8 A. I didn't see, and I didn't expect to see.
 9 Because these are the kind of things that do not go
 10 into a transcript which is not verbatim, as you rightly
 11 said before about a summary. So when I, in the military
 12 courts, time and again, ask the judges to instruct the
 13 interpreter to interpret, nothing of that was documented
 14 in the court transcript.
 15 Q. So if you have, in any of the 21, any
 16 evidential basis for any concern about the specific
 17 case, please include that in our discussion.
 18 A. Well, I --
 19 Q. But we -- if I may?
 20 A. Sure.
 21 Q. But we can have a standing understanding
 22 that you're not withdrawing any of the comments you
 23 made in your report about the systemic issues that
 24 you've identified.
 25 Is that fair?

1 A. It is fair. And I attribute these systemic
 2 failures to the 21 cases as well. Because these
 3 systemic failures that we've documented and reported
 4 in Yesh Din -- in the Yesh Din report -- my report
 5 here have been in place during the time frame that
 6 the 21 cases were litigated.
 7 Q. I think what we'll do is agree that that's --
 8 that that's your position.
 9 A. Right.
 10 Q. And you don't need to repeat it.
 11 A. Okay.
 12 Q. But if there's particularized evidence about
 13 any of those issues, it's important that we discuss it.
 14 A. Fair enough.
 15 Q. Thank you.
 16 Okay. Have we talked -- is there anything
 17 that you wish to add about the Nur case, other than
 18 what we've just discussed with regard to your -- your
 19 systemic concerns you raised in your report?
 20 A. No. But I want to correct what -- what
 21 I said before. His conviction is based only on his
 22 out-of-court statements. And the only corroborative
 23 evidence that the court found was the actual occurrence
 24 of the attack that he was charged with. So that was
 25 the additional we call it --

| | |
|---|---|
| <p style="text-align: right;">Page 173</p> <p>1 Q. Corroborating evidence?</p> <p>2 A. Well, additional corroborating evidence. So</p> <p>3 whatever strategy there is to -- that includes con --</p> <p>4 consenting to admission of out-of-court statements when</p> <p>5 they themselves, together with the actual fact that the</p> <p>6 attack occurred, may cause a conviction is a strategy</p> <p>7 that I, for one, cannot figure out.</p> <p>8 Q. Do you know whether today Mr. Nur maintains</p> <p>9 his innocence?</p> <p>10 A. I have no idea.</p> <p>11 Q. Do -- do you know whether Mr. Nur was ever</p> <p>12 identified in any of the dozen or so potential channels</p> <p>13 with regard to coercion?</p> <p>14 Remember we talked about lots of different</p> <p>15 outlets for allegations of coercion?</p> <p>16 A. Yes, I remember. And it might be. I have</p> <p>17 not looked through the files of PCATI. And I have</p> <p>18 definitely not looked through the -- well, that's the</p> <p>19 only one. Aah, maybe he lodged a complaint. I don't</p> <p>20 know. It wouldn't be public.</p> <p>21 Q. So -- so why don't we talk about Abd-el Karim</p> <p>22 Ratheb Younis Aweis.</p> <p>23 A. Let's.</p> <p>24 Q. All right. I need to ask you a question.</p> <p>25 Before I can do that, I need to find my notes. You</p> | <p style="text-align: right;">Page 175</p> <p>1 "no."</p> <p>2 A. Okay.</p> <p>3 Q. That's fine. I'm not trying to bully you,</p> <p>4 as I think you can tell.</p> <p>5 Let me ask the question.</p> <p>6 A. Okay.</p> <p>7 Q. Based on the evidence that you have reviewed,</p> <p>8 pertaining specifically to the case of Abd-el Karim</p> <p>9 Ratheb Younis Aweis, do you believe, to a reasonable</p> <p>10 degree of certainty, that Mr. Aweis was actually</p> <p>11 denied due process of law?</p> <p>12 A. I believe that he was denied due process</p> <p>13 of law during his interrogation. With the absence</p> <p>14 of the documents, I cannot say that for certainty.</p> <p>15 But it is very likely. I believe that he suffered</p> <p>16 from due process failures of the general type we've</p> <p>17 discussed, and I will not repeat them. And -- and</p> <p>18 I would say that there are question marks surrounding</p> <p>19 the effective [sic] of his representation -- the</p> <p>20 effectiveness of his representation. But I wouldn't</p> <p>21 say that for sure.</p> <p>22 Q. Do you -- did you have an opportunity to</p> <p>23 read Mr. Aweis' pre-sentencing statement to the court?</p> <p>24 A. I'm sure I have, but I don't remember it.</p> <p>25 Yeah, I can see it.</p> |
| <p style="text-align: right;">Page 174</p> <p>1 don't have to write that down. You can if you want.</p> <p>2 All right.</p> <p>3 You've -- you've reviewed the files plaintiffs</p> <p>4 provided about Mr. Aweis; right?</p> <p>5 A. Right.</p> <p>6 Q. Based on the evidence that you've reviewed,</p> <p>7 pertaining specifically to the case of Abd-el Karim</p> <p>8 Ratheb Younis Aweis, do you believe, to a reasonable</p> <p>9 degree of certainty, that Mr. Aweis was actually denied</p> <p>10 due process of law?</p> <p>11 A. Mr. Aweis has been found guilty as part</p> <p>12 of a plea bargain after a three-month pre-trial GSS</p> <p>13 interrogation between March 30th of 2002 and June 30th</p> <p>14 of 2002. We have not even a single document in -- in</p> <p>15 our -- I don't have in -- in the file that I've been</p> <p>16 given to suggest what happened during those three</p> <p>17 months. So much of the case was actually decided</p> <p>18 during those three months.</p> <p>19 Q. So -- I -- I'm sorry. Were you finished?</p> <p>20 A. Yeah.</p> <p>21 Q. Okay. So see if you can answer my question</p> <p>22 with a "yes" or "no."</p> <p>23 A. Okay. I'll try.</p> <p>24 Q. If you -- if you can't answer it with a "yes"</p> <p>25 or "no," you can just say: I can't answer it "yes" or</p> | <p style="text-align: right;">Page 176</p> <p>1 Q. Would -- would you be kind enough to -- well,</p> <p>2 there's a -- there's a part in my English translation</p> <p>3 from Mr. Kaufman's report that begins:</p> <p>4 "The acts which I did, I am proud of them,</p> <p>5 and there is justification for what I did."</p> <p>6 Do you see that in the original?</p> <p>7 A. That's before sentencing or before conviction?</p> <p>8 Q. According to Mr. Kaufman's report, it was</p> <p>9 immediately before sentencing.</p> <p>10 A. Yeah, I can see that.</p> <p>11 Q. Would you feel comfortable translating</p> <p>12 on-the-fly?</p> <p>13 A. I -- I think what you've just read out</p> <p>14 is quite accurate.</p> <p>15 Q. So I --</p> <p>16 A. Things that I've --</p> <p>17 Q. So -- so I'm going to read Mr. Kaufman's</p> <p>18 translation. And if you disagree with it, you just</p> <p>19 let me know. Okay?</p> <p>20 A. Okay.</p> <p>21 Q. Mr. Kaufman is translating the statement</p> <p>22 of Abd-el Karim Ratheb Younis Aweis. And he says:</p> <p>23 "The acts which I did, I am proud of them,</p> <p>24 and there is justification for what I did. The reason</p> <p>25 for them is the Israeli occupation and the Israeli Army,</p> |

1 which every day kills civilians and the last among
 2 them is the killing of my brother Samar. If I could
 3 kill more Jews, I would not hesitate. What I would
 4 like to state here is this: The Intifada will continue
 5 and also the attacks will continue within Israeli
 6 territory until the state of Palestine is created
 7 and the Army withdraws from the occupied territories."

8 Is that a fair translation?

9 A. It is.

10 Q. And what was Mr. Aweis convicted of doing
 11 that he was proud of?

12 MR. HILL: Objection. Lack of foundation
 13 as to what Mr. Aweis meant.

14 The witness can respond.

15 THE WITNESS: What's the question?

16 Q. BY MR. YALOWITZ: What was Mr. Aweis
 17 convicted of?

18 A. He was convicted of involvement in the
 19 March 21st, 2002, terror attack in King George Street
 20 in Jerusalem, in membership in an illegal organization,
 21 holding weapons, throwing stones, and -- I mean,
 22 manslaughter.

23 Q. I'm sorry?

24 A. Man -- manslaughter in connection to this
 25 terror attack. That's the -- the criminal charge.

1 Q. Would we say --

2 A. Attempted manslaughter. Murder.

3 Q. Would we say homicide?

4 A. Murder. Well, in -- in -- in military law,
 5 it's the -- there is one -- one offense for -- for
 6 murder and -- and manslaughter. And -- and some more
 7 weapons-related offenses.

8 Q. Do you -- do you understand Mr. Aweis to
 9 be justi -- first of all, do you understand Mr. Aweis
 10 to have been convicted of an incident of terrorism?

11 A. Yes.

12 Q. And do you understand him to be attempting
 13 to justify that as retaliation for the killing of
 14 civilians, including his brother?

15 A. Yes. And I resent that.

16 Q. What do you mean you resent it?

17 A. I don't like what I hear.

18 Q. Explain what you mean.

19 A. I do not accept his -- I do not -- if that
 20 is indeed what he said and that is the justification
 21 for the things --

22 Q. You reject it?

23 A. -- I reject it. But that doesn't mean he's
 24 not entitled to a fair trial and due process. And
 25 this is what I was looking for and not whether he

1 was an angel or not.

2 Q. And so you, I think, said -- well, I think
 3 I wrote down what you said about your opinion on whether
 4 he received due process. So I don't need to re-ask you.

5 But is there anything else about his case
 6 that gives you an evidential basis for your opinion
 7 that there is specific evidence pertaining to his case
 8 showing whether, to a reasonable degree of certainty,
 9 he was actually denied due process of law?

10 A. On July 2nd, 2002, Date 11-29 is the -- the
 11 trial detention hearing -- hearing for to -- to decide
 12 whether he will stay in detention and remand during
 13 the trial. His attorney has not arrived. And the --
 14 the court has -- has conducted the hearing without
 15 the defense attorney present and concluded to remand
 16 him. Also the --

17 Q. May I just ask one question about that?
 18 And then I'll continue on.

19 That -- that incident that you've just
 20 described, did that go to Mr. Aweis' guilt or innocence,
 21 or was that a failure of --

22 A. Due process.

23 Q. -- due process with regard to -- with regard
 24 to whether he would remain in custody pending a final
 25 decision --

1 A. Whether he remain --

2 Q. -- of his trial?

3 A. Whether he remained in custody pending trial.

4 Q. Okay. Now, you -- I didn't mean to --
 5 I did mean to interrupt you. I apologize for that.
 6 But tell me what's your --

7 A. So on -- on the same -- on the same date
 8 and on the -- in the same hearing, Mr. Aweis said
 9 that he is in solitude for 90 days. And then the
 10 court transcript says that the defendant is pointing
 11 to -- to cuts in his body, his arms, his shoulders,
 12 and his back, and to -- and on his legs and then,
 13 quote, continues "every day I ask to see a doctor,
 14 and I didn't get one."

15 Q. And does that -- does that go to his guilt
 16 or innocence, or does it go to whether he should
 17 be receiving medical treatment?

18 A. Mr. Yalowitz, look, you cannot distinguish
 19 between the different parts of due process. Due
 20 process rights is a bundle of rights that are supposed
 21 to create the atmosphere that enables a defendant to
 22 defend himself, not to be coerced, not to be pressured
 23 into something that is to his detriment.

24 I do not know, Mr. Yalowitz -- I do not know
 25 what his mental and physical powers are and what drives

1 people into plea bargains or to admit things they might
 2 have not done. I don't know. All I know is that, not
 3 by chance, international legal standards, as most --
 4 national legal standards in civilized countries have
 5 made these safeguards in order -- in order to be certain
 6 that people do not -- that we lower the risk that people
 7 say things they don't want to say, that they plead when
 8 they don't want to plead.

9 So you can say that detaining a person for
 10 five years doesn't go to his innocence or -- or guilt.
 11 But if a person is in detention for five years --
 12 and we have a case in the 21 cases where a person
 13 was in detention for six years. And I don't know
 14 what eventually leads a person to say: I want a
 15 plea bargain. Let's -- let's just get -- get over
 16 with all of this.

17 So yeah, I mean, this is an example. He
 18 did not get a lawyer. He did not get a doctor. He
 19 was 90 years [sic] in solitude. No one knew about
 20 his case. These are all due process issues that
 21 may have an effect on guilt. I'm not saying it had,
 22 because I don't know, but it may.

23 Q. Thank you.

24 MR. HILL: For the record, the witness said
 25 "90 years." I think he meant --

1 THE WITNESS: "90 days."

2 MR. HILL: -- "90 days."

3 THE WITNESS: Of course, "90 days."

4 Q. BY MR. YALOWITZ: I -- I thought it was
 5 "90 days." But I trust you that it was -- I thought
 6 he said "90 days." We're on the same wavelength on
 7 some things.

8 A. Yeah.

9 Q. Perhaps not everything we're discussing.

10 Shall we go to the case of Nasser Jamal
 11 Mussa Shwaysh?

12 A. Yeah.

13 Q. Okay. Would you like to get your file?

14 A. Yes. It's a big one.

15 Q. Now -- Mr. Sfard, let me know when you're
 16 ready.

17 A. I'm ready.

18 Q. Now, I think you know by now I'm going to
 19 give you the opportunity to say everything you want
 20 to about the case of Nasser Jamal Mussa Shwaysh.

21 A. Yes.

22 Q. But, first, I want to ask you my specific
 23 question. And do your best, if you can, to give me
 24 either a "yes" or a "no" or "I can't answer it 'yes'
 25 or 'no.'"

1 Here's my question. Based on the evidence
 2 you have reviewed, pertaining specifically to the
 3 case of Nasser Jamal Mussa Shwaysh, do you believe,
 4 to a reasonable degree of certainty, that Mr. Shwaysh
 5 was actually denied due process of law?

6 A. I do.

7 Q. Okay. Please state the evidential basis for
 8 your opinion.

9 A. Okay. This defendant was not represented.
 10 At a certain hearing on the -- November 14 -- November
 11 14th of 2002, he told the court:

12 (Reading/translating.)

13 "I still haven't been appointed a lawyer,
 14 and regarding this case, I do not know what to do."

15 Eventually, he decides not to have a lawyer,
 16 and he conducts the -- the case by himself. In his
 17 case, four different witnesses -- prosecution witnesses
 18 allege that they were tortured, they were abused in
 19 interrogation into saying -- into incriminating him.
 20 And their statements were all admitted by the judges.

21 Q. I'm sorry. Could you just say the last
 22 thing again before their "statements were admitted"?

23 A. Four --

24 Q. Did they -- did they allege torture? Is
 25 that what you're saying?

1 A. They have alleged torture. I'll give you
 2 a few examples.

3 Q. I mean, "torture" is such a loaded word,
 4 you know. It brings to mind the pulling of fingernails
 5 or things like this.

6 Is that what they were alleging?

7 A. They were alleging beatings, threats of
 8 rape -- these are women -- threats of rape, threats to
 9 demolish their home, 130 days of solitary confinement,
 10 which the Committee Against Torture has found to be
 11 torture, solitary confinement of that type. Again,
 12 threat of rape. An officer that hit -- hit Kahira --
 13 this is Kahira Sa'adi -- three times. And again
 14 threats and so on and so forth. I think I mentioned
 15 these in my report. That was one of the --

16 Q. Well, just -- just give us -- I'm sorry.
 17 I didn't mean to interrupt. Go ahead.

18 Did you want to continue on that line?
 19 Because I wanted to probe it a little bit more.

20 Why don't I ask a question?

21 A. Okay.

22 Q. Okay. I mean, I know it's difficult because
 23 you're looking at your notes and --

24 A. Right.

25 Q. -- so forth. I don't want to interrupt you.

1 But I want to take it in bite-size pieces so that you
 2 can describe something and then we can talk about it.
 3 So with regard to allegations of coercion --

4 A. Right.

5 Q. -- you mentioned several things.

6 Were there any other specific things that
 7 came to your attention?

8 MR. HILL: With regard to coercion? Is
 9 that your question?

10 MR. YALOWITZ: With regard to alleged
 11 coercion.

12 THE WITNESS: There were -- I mean, there --
 13 again, four witnesses, two of them -- no, four -- all
 14 four women, all four allege threats of rape, beatings
 15 in different nuances, and threats on demolishing their
 16 family house, things of -- things of that sort. These
 17 were generally the allegations made.

18 Since he had no attorney and since he had --
 19 didn't ask for the GSS file of the investigation of
 20 the prosecution witnesses, he didn't -- couldn't and
 21 didn't ask to -- to interrogate or to cross-examine --
 22 sorry -- the GSS interrogators, the whole allegation
 23 didn't -- was not examined. That is one section of
 24 due process issues in this case.

25 Another is --

1 Q. BY MR. YALOWITZ: I'm sorry. Just to
 2 summarize, the -- the issue was the one section --

3 A. The admission of out-of-court statements
 4 that were allegedly coerced without -- I'm not saying
 5 that it's -- that it's -- in no circumstances a court
 6 of law cannot admit out-of-court statements when there
 7 is an allegation that they have been coerced.

8 The court has a duty to examine such
 9 allegations, to review them, to make sure that they
 10 have not been coerced. In this case, no such review
 11 has been conducted. And a serious judge should have
 12 initiated such inquiry, not -- definitely in a case
 13 where the defendant is not represented. So this is
 14 one section.

15 Another section is that Mr. Shwaysh --

16 Q. Before we go on to the next section, may
 17 I just ask you a couple questions about --

18 A. Yes.

19 Q. -- that section?

20 Thank you.

21 Karim Ratheb Younis Aweis [sic] testified
 22 in the trial of Nasser Jamal Mussa Shwaysh; right?

23 A. I think he did. Yes. He was the first --
 24 he was the first prosecution witness.

25 Q. Did Karim Ratheb Younis Aweis [sic] contend

1 that his testimony was coerced?

2 A. He denied that he signed some of the -- some
 3 of the out-of-court statements and affirmed regarding
 4 others. He didn't -- in his testimony at Shwaysh's
 5 trial, he didn't allege coercion.

6 Q. Aweis was the one that we just talked about
 7 a moment --

8 A. Right.

9 Q. -- ago who said that the -- that the killings
 10 were revenge and he would kill more Jews if he had the
 11 chance? Is that the same guy?

12 A. That's the guy.

13 Q. Okay. Now, you were going to tell us next
 14 other -- about any other due process concerns that
 15 you had?

16 A. Mr. Shwaysh was in pre-trial detention --
 17 pre-indictment detention for three months and nine
 18 days between June 3rd, 2002, and September 12th, 2002.
 19 We have no record of his happenings during that time.
 20 And, again, I refer to my general assertions regarding
 21 investigations in the GSS.

22 He eventually was convicted through
 23 confessions he made, again, in installments and --
 24 and not in -- not in a -- an official way. It's
 25 not that he was asked, "do you confess, do you plead

1 guilty?" and he pled guilty. He didn't. Instead,
 2 the court has convicted him based on things he said
 3 in different hearings.

4 Again, I remind you that he was not
 5 represented. So I see that as a major due process flaw.

6 Q. The -- the failure of representation?

7 A. Yes. The failure of representation, the
 8 failure for effective defense --

9 Q. So --

10 A. -- to have an effective defense.

11 Q. So -- so doesn't a defendant here in Israel
 12 have the right to choose to represent himself if he
 13 chooses?

14 A. That's right.

15 Q. And do you believe that -- do you believe
 16 that Mr. Shwaysh's choice was -- was not an informed
 17 one?

18 A. I do not know if it was an informed one
 19 or not. But I know that there is no record that the
 20 judges in this court have made the extra mile they
 21 had to do in order to explain to him before he says
 22 things that can -- can incriminate himself. Because
 23 he didn't -- again, his -- he confessed in -- in --
 24 again, in installments, in --

25 Q. Do -- do you have the October 6th, 2002,

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|---|--|
| <p style="text-align: right;">Page 189</p> <p>1 transcript before you?</p> <p>2 A. October 6?</p> <p>3 Q. 2002.</p> <p>4 A. Let's see. You sure it's 2002?</p> <p>5 Aah, October 6. Yes, I can see it.</p> <p>6 Q. Mr. Kaufman reports that the -- the record</p> <p>7 reflects the following statement by the defendant.</p> <p>8 I'll read the English translation Mr. Kaufman provided.</p> <p>9 "I do not want to be represented by a lawyer.</p> <p>10 I have understood what the court has told me concerning</p> <p>11 the need to be represented, but I maintain this</p> <p>12 refusal."</p> <p>13 Is that a fair translation?</p> <p>14 A. It is. And then what happens next in the</p> <p>15 same day? The -- the defendant is giving his -- his</p> <p>16 reaction to the -- to the indictment and actually</p> <p>17 incriminates himself time and again. It's not a plea.</p> <p>18 The court does not find him guilty on that day.</p> <p>19 Only after a case -- after several -- several</p> <p>20 months, in January of 2003 -- on the 14th of January,</p> <p>21 2003, the court says that, on the basis of what he</p> <p>22 said back then in the first hearing, evidence hearing</p> <p>23 on 6 October, 2002, they find him guilty of a list of --</p> <p>24 of offenses.</p> <p>25 Q. What did the defendant say after the court --</p> | <p style="text-align: right;">Page 191</p> <p>1 the witness gave evidence on the 10th of December,</p> <p>2 2002.</p> <p>3 A. 20th of December?</p> <p>4 Q. 10th.</p> <p>5 A. 10th of December? Yes.</p> <p>6 Q. Is that correct?</p> <p>7 A. Uh-huh. Yes, it is.</p> <p>8 Q. When Mr. Kaufman reports:</p> <p>9 "At page 8 of the transcript, line 8 onwards,</p> <p>10 the defendant admitted that he knew that" Nasser --</p> <p>11 I'm sorry.</p> <p>12 -- "the defendant admitted that he knew</p> <p>13 that" Abd-el Karim Ratheb Younis "Aweis had armed</p> <p>14 the suicide bomber ... with an explosives belt and</p> <p>15 confessed to transferring" the suicide bomber "by car</p> <p>16 to a location from where he made his way to Jerusalem</p> <p>17 by hitchhiking." (As read.)</p> <p>18 Is that a --</p> <p>19 A. Which lines in the -- in page No. 8?</p> <p>20 Q. Page 8, line 8.</p> <p>21 A. Line 8?</p> <p>22 MS. WEISER: No, no.</p> <p>23 MR. HILL: What's the question?</p> <p>24 Q. BY MR. YALOWITZ: I want to make sure the</p> <p>25 witness --</p> |
| <p style="text-align: right;">Page 190</p> <p>1 after he acknowledged that he understood what the</p> <p>2 court told him --</p> <p>3 A. He said on --</p> <p>4 Q. -- concerning the need to be represented,</p> <p>5 what did he then say that incriminated himself?</p> <p>6 MR. HILL: Objection. Lack of foundation.</p> <p>7 The witness can respond.</p> <p>8 THE WITNESS: He said on -- on Counts 1, 4,</p> <p>9 10, 11, 12, 16, 20, 21:</p> <p>10 (Reading/translating.)</p> <p>11 "I have a -- I have a serious case, serious</p> <p>12 problem. If I" --</p> <p>13 I -- no. Sorry.</p> <p>14 (Reading/translating.)</p> <p>15 "I have a serious case. If I would do these</p> <p>16 small things, I would tell it to the court. In No. 22,</p> <p>17 she asked me. I didn't send her."</p> <p>18 Look, this -- these are things that the court</p> <p>19 should have stopped him and say: Look, I will -- you</p> <p>20 don't want a lawyer, at least let me explain to you</p> <p>21 what are the ramifications of things of that sort that</p> <p>22 you're saying in open court, what you will be facing.</p> <p>23 And then maybe you'll want to think again whether you</p> <p>24 want a lawyer or not.</p> <p>25 Q. BY MR. YALOWITZ: Mr. Kaufman reports that</p> | <p style="text-align: right;">Page 192</p> <p>1 A. What is the --</p> <p>2 Q. Is that a fair -- is that a fair translation?</p> <p>3 A. Let -- let me translate it from what I see.</p> <p>4 (Reading/translating.)</p> <p>5 "If one wants to send" --</p> <p>6 This is the defendant speaking.</p> <p>7 (Reading/translating.)</p> <p>8 "If one wants to send a suicide bomber, there</p> <p>9 is no need for four or five people -- people for this."</p> <p>10 It doesn't say "people." "For this."</p> <p>11 (Reading/translating.)</p> <p>12 "It's not true. The person who put the</p> <p>13 explosive belt on Mohammed was Abd-el Karim Aweis</p> <p>14 and Abd-el Karim Mohammed Hasheika. And they were</p> <p>15 alone in the room."</p> <p>16 I don't know what to infer from this, if</p> <p>17 he knows that after the fact or he knew that back then.</p> <p>18 I don't know.</p> <p>19 Q. Do you -- have you had an opportunity to</p> <p>20 read Mr. Shwaysh's comments at his sentencing?</p> <p>21 A. I'm sure I have. But let me remind myself</p> <p>22 of it. Which -- do you remember -- do you know which</p> <p>23 date it is?</p> <p>24 Q. March 10th, 2003.</p> <p>25 A. I can't seem to find it. Let's -- let's</p> |

1 go on. I can't seem to find it, but let's go on.
 2 Q. Okay. Fair enough.
 3 Did you have an opportunity to read
 4 Mr. Kaufman's report in advance of your deposition
 5 here today?
 6 A. Yes.
 7 Q. And did you study his report carefully and
 8 check it to see if it was accurate?
 9 A. Factually?
 10 Q. Yes.
 11 A. I was more interested in the due process
 12 assertions that he made. So I can't say that I have.
 13 Q. All right. Did -- did you notice any errors
 14 in his report with regard to his reporting of the facts?
 15 A. Let me get his -- my copy of his report.
 16 Q. Sure.
 17 A. It's full of coffee stains. Sorry.
 18 Q. That's all right.
 19 A. Aah, this is not the one where I -- okay.
 20 I don't -- I don't recall.
 21 Q. Fair enough.
 22 A. I'm not saying there wasn't and -- there
 23 weren't any errors that I found, but I don't recall.
 24 Q. Did -- did you come away with an impression
 25 that he was an accurate reporter of the facts?

1 A. I didn't really examine the accuracy of his
 2 reports, definitely not in a resolution of translation
 3 or dates or things of that sort.
 4 Q. Do you believe, to a reasonable degree of
 5 certainty, that Nasser Jamal Mussa Shwaysh is actually
 6 innocent?
 7 A. I cannot answer that question.
 8 Q. And let me just ask you the same question
 9 of Abd-el Karim Ratheb Younis Aweis.
 10 Do you believe, to a reasonable degree of
 11 certainty, that Abd-el Karim Ratheb Younis Aweis is
 12 actually innocent?
 13 A. I cannot answer that question. And, also,
 14 it was not my mandate.
 15 Q. When you say you can't answer that question,
 16 what do you mean by that?
 17 A. I mean that, as a lawyer, as a -- someone
 18 that wants to be a serious lawyer, I cannot make
 19 judgment calls based on partial -- a very small part
 20 of the information in -- in those cases.
 21 Q. So do you think it's a tip-off as to guilt
 22 or innocence that Abd-el Karim Ratheb Younis Aweis
 23 said "the acts I did I am proud of them and there
 24 is justification for what I did"?"
 25 MR. HILL: Objection. Lack of foundation.

1 Q. BY MR. YALOWITZ: Do you think that that's
 2 a tip-off that he's actually guilty?
 3 A. Well, as a defense lawyer, it actually
 4 raises my suspicion whether -- if he's so proud, maybe
 5 he enlarges his role in those -- in those charges. But
 6 it's not a tip-off not to this, nor -- nor to the other.
 7 Q. In your view, when a man says, immediately
 8 before his sentence, that he's proud of the acts, that
 9 that doesn't give you any evidence as to whether he's
 10 innocent or guilty?
 11 A. No.
 12 Q. Do you think that that's one of those things
 13 where you're in sort of the small minority?
 14 A. No. I think that serious defense attorneys --
 15 I'm in a large majority. I think that especially in --
 16 in cases where there is institutional due process
 17 issues, there are many things that drive people to
 18 admit to things they didn't do. And I didn't -- and
 19 I'm not suggesting that any of those didn't do what
 20 they were convicted of. I'm just saying that their --
 21 their guilty pleas, their admissions out of court and
 22 especially their pride, when they express such pride,
 23 may be motivated by many things that are not necessarily
 24 the truth.
 25 Q. Have you ever had a client who maintained

1 his innocence?
 2 A. Did I have a client that maintained his
 3 innocence? I had.
 4 Q. And do clients -- in your experience, do
 5 clients who maintain their innocence, immediately
 6 before they're being sentenced, tell the court that
 7 they're proud of what they did and they'd kill more
 8 people if they could?
 9 A. It happens only in -- in security related
 10 cases.
 11 Q. You've had such a client?
 12 A. I don't recall that I had a client that
 13 said that. But I recall many cases of that sort. Yes.
 14 Q. Where clients maintained their innocence
 15 and said that they're proud that they killed Jews?
 16 A. Maintained their innocence in the sense
 17 that -- instructed their attorneys to -- to present
 18 a defense and to try to acquit them. And when they
 19 are convicted, then they say things that might be
 20 because these are -- this is the truth and it might
 21 be because they want to be -- get some respect among
 22 whatever community that thinks these kind of things
 23 are -- are a matter to be proud of.
 24 Q. In the parole system in Israel, does the
 25 acceptance of responsibility and the acknowledgment

1 of remorse play a role in whether parole will be
 2 granted?
 3 A. A very significant role.
 4 Q. And so a defendant who is actually innocent
 5 and wishes parole is in a tough spot?
 6 A. Very, very tough spot. I had -- I had such
 7 cases.
 8 Q. And in the cases that you've had in that
 9 situation, did your clients say "I'm proud of what
 10 I did"?
 11 A. In the parole board?
 12 Q. Yes.
 13 A. Look, someone that goes to the parole board
 14 wants to get something. So he wouldn't say that he's
 15 proud.
 16 Q. Why don't we -- why don't we move to the
 17 case of Kahira Sa'id Ali Sa'adi.
 18 A. Yeah.
 19 Q. Ali Sa'adi. Do you have her file?
 20 A. No. 4. Yeah.
 21 Q. She's the fourth one on the list.
 22 A. Yeah.
 23 Q. And before we go to her specifically, I've --
 24 I've asked you a number of times about actual innocence.
 25 And I think I've asked it before, but let me just make

1 specific way, just so I have it on the record. Okay?
 2 A. Okay.
 3 Q. For any of the 21 individuals convicted of
 4 the crimes we're discussing today, is it your opinion
 5 that you have a reasonable doubt about their actual
 6 guilt?
 7 A. Reasonable doubt I might have. But -- but
 8 it's -- it's -- again, this is not the way to conduct
 9 a -- a review of guilt or innocence. You have to have
 10 the full -- the full information.
 11 And since, out of 21 cases, 21 are based
 12 on out-of-court statements, admissions, about 17 or
 13 18 of them of the accuseds themselves, some of them
 14 of -- of co-conspirators, it is not possible for me
 15 to make any judgment call without having the -- the
 16 material that documents how these statements came about.
 17 Q. So I -- and I appreciate your answer. And
 18 I'm not trying to argue with you. I just want to see
 19 if I can get an answer to the very specific question.
 20 And, again, "yes," "no," or "I can't answer 'yes' or
 21 'no'" is fine.
 22 For any of the 21, is it your opinion,
 23 to a reasonable degree of certainty, that there is
 24 a reasonable doubt about their guilt?
 25 Do you have such opinion?

1 sure I've got it right.
 2 Is it your opinion, to a reasonable degree
 3 of certainty, that any of the 21 individuals who
 4 were convicted of the terrorist activity that we're
 5 discussing is actually innocent?
 6 MR. HILL: Objection. Asked and answered.
 7 THE WITNESS: I have answered. And I said
 8 that I cannot make this. And while we're at it, I'll
 9 just say that what I need to have is a reasonable doubt
 10 that they're innocent.
 11 Q. BY MR. YALOWITZ: Well, you would agree
 12 that's -- that's not up to you; right?
 13 A. No, no. I mean, if you want me to make a
 14 judgment call, this is the test that I should employ,
 15 rather than what you suggested be with a degree of
 16 certainty and so on. But as I said, I didn't do
 17 neither. So I don't have any.
 18 Q. You didn't do either one?
 19 A. Right.
 20 Q. You don't have an opinion as to whether
 21 there's a reasonable doubt of guilt or innocence?
 22 A. I cannot make any judgment without having
 23 the full information, file, and all the relevant
 24 material of the case.
 25 Q. So -- so let me just ask it in a really

1 A. I cannot answer this question.
 2 Q. Thank you. Okay.
 3 MR. HILL: Kent, do you mind, before you
 4 start the next file, if we take a break? We've been
 5 on for a little over an hour.
 6 MR. YALOWITZ: That's fine.
 7 (Recess from 3:11 p.m. to 3:19 p.m.)
 8 Q. BY MR. YALOWITZ: Do you have the file of
 9 Kahira Sa'id Ali Sa'adi before you?
 10 A. To say that I have the file would be an
 11 exaggeration. I have a very small part of the file
 12 in front of me.
 13 Q. Well, I mean, are you -- are you saying
 14 that you don't have something you were provided, or
 15 are you making sort of a forensic point?
 16 A. No, no. I'm saying that it is clear that
 17 I don't have the full file. This is -- but this is
 18 what I received.
 19 Q. You have whatever file -- whatever file
 20 your colleagues at Miller & Chevalier provided, you
 21 have?
 22 A. Yes.
 23 MR. HILL: And for the record, he has what
 24 Mr. Kaufman has.
 25 MR. YALOWITZ: Fine. Okay.

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| <p style="text-align: center;">Page 201</p> <p>1 MR. HILL: Or I guess, more precisely, what 2 the plaintiffs produced to us and represented as what 3 Mr. Kaufman had.</p> <p>4 THE WITNESS: Kaufman mentions an evidential 5 hearing and cross-examinations. We don't -- we didn't 6 find any in our -- in -- in what we've received.</p> <p>7 Q. BY MR. YALOWITZ: Let me ask my question 8 first, and then we'll go to your discussion. Okay?</p> <p>9 A. Yes.</p> <p>10 Q. Based on the evidence you have reviewed, 11 pertaining specifically to the case of Kahira Sa'id 12 Ali Sa'adi, do you believe, to a reasonable degree 13 of certainty, that Ms. Sa'adi was actually denied 14 due process of law?</p> <p>15 A. I do.</p> <p>16 Q. Okay. Please explain the evidential basis 17 for your opinion.</p> <p>18 A. Apart from the general assertions that I made 19 about the military court system as a whole, specifically 20 regarding Ms. Kahira Sa'adi, we have the benefit of 21 having Mr. Shwaysh's file. And we know that she has 22 raised allegations of abuse during her interrogation 23 then. And as I said, this was not reviewed.</p> <p>24 She was detained for two months in a 25 pre-indictment detention, which was -- and most</p> | <p style="text-align: center;">Page 203</p> <p>1 A. It may be. 2 Q. Please explain. 3 A. It may be the judges would have to evaluate 4 what kind of damage has been done to the defense by 5 not being able to cross-examine.</p> <p>6 Q. Do the judges in the military courts have 7 the same obligation?</p> <p>8 A. I have never seen a serious consideration 9 of this in military courts. But, again, in theory, 10 they are.</p> <p>11 Q. Is the -- is detention for two months a 12 violation of due process?</p> <p>13 A. Detention of two months may be a violation 14 of due process, especially when it comes with complete 15 isolation from the outer world and -- well, that's 16 my answer.</p> <p>17 Q. Do you have any evidential basis to conclude 18 that Kahira Sa'id Ali Sa'adi was isolated from the 19 outside world for two months?</p> <p>20 A. No.</p> <p>21 Q. Do you have any evidential basis to conclude 22 that Kahira Sa'id Ali Sa'adi was denied access to 23 an attorney for any period of time?</p> <p>24 A. I know that this is the policy of the GSS 25 in such cases and to, one, deny access to an attorney</p> |
| <p style="text-align: center;">Page 202</p> <p>1 probably -- again, I cannot know for sure what, but 2 was probably denied access to an attorney. One -- 3 the only prosecution witness that we know for certainty 4 that took the stand in her case refused to answer any 5 questions. And his out-of-court statement was admitted 6 eventually.</p> <p>7 What else? This is the only -- these are 8 the things that I have to say.</p> <p>9 Q. So the refusal of a prosecution witness to 10 testify and the admission of the witness' out-of-court 11 statement, is that a denial of due process?</p> <p>12 A. One of the main, most important due process 13 rights is to cross-examine evidence -- cross-examine 14 witnesses, incriminated -- incriminating witnesses.</p> <p>15 Q. Is the -- is the right of the prosecution 16 to admit an out-of-court statement, in the circumstances 17 where the witness refuses to testify, different in the 18 military courts and in the civilian courts?</p> <p>19 A. In theory, it is not. In practice, it is 20 very frequent in military court and very rare in the 21 civilian court.</p> <p>22 Q. In the civilian courts, if a prosecution 23 witness refuses to testify, his or her out-of-court 24 statement will be admissible against the defendant; 25 correct?</p> | <p style="text-align: center;">Page 204</p> <p>1 and, two, issue gag orders regarding the investigation, 2 not for the full two months necessarily. It may be 10 3 or 20 days. It may be more. It may be less. I would 4 expect, if I get the GSS file, to find there gag orders 5 and denial of access to attorney orders.</p> <p>6 Q. Let me try it again. 7 Do you have any evidential basis to conclude, 8 based on the evidence before you, that Kahira Sa'id 9 Ali Sa'adi was denied access to an attorney?</p> <p>10 MR. HILL: Objection. Asked and answered. 11 THE WITNESS: I don't have any -- any document 12 in this case that says this.</p> <p>13 Q. BY MR. YALOWITZ: Thank you. 14 Now, did Kahira Sa'id Ali Sa'adi testify in 15 the trial of Nasser Jamal Mussa Shwaysh before or after 16 she was convicted of her crimes?</p> <p>17 A. Let's see. Her conviction is on -- from July 18 15th, 2004. Her -- she gave evidence on November -- 19 24th November, 2002. She gave evidence in Shwaysh's 20 trial before she was convicted in her trial.</p> <p>21 Q. Can -- can you explain why her counsel did 22 not raise the issue of coercion in her trial?</p> <p>23 A. That's a question that I'm struggling with. 24 I don't know.</p> <p>25 Q. Do you agree with me that her statements in</p> |

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| <p style="text-align: right;">Page 205</p> <p>1 the trial of Nasser Jamal Mussa Shwaysh would have been 2 available to her counsel? 3 A. If they were available to her counsel? 4 I guess that, if he would demand to receive them or 5 ask the defense attorney of Shwaysh, he would get it. 6 Q. Or ask her? 7 A. Ask her for the transcript of what she said 8 at Shwaysh's trial? She wouldn't have it. 9 Q. Ask her to tell him what she said? 10 A. Yes. 11 Q. And was he permitted to accompany her to 12 her testimony in the Shwaysh trial? 13 A. I don't see why not. 14 Q. Why don't we go to the case of Sana'a Mohammed 15 Shchada. 16 A. No. 5. 17 Q. By the way, were you aware that Kahira Sa'id 18 Ali Sa'adi has been released? 19 A. I think I heard that from defense attorneys 20 in recent days. But I was not aware. 21 Q. Did you speak to her about her conviction? 22 A. No. 23 Q. Was there anything preventing you from doing 24 that? 25 A. I have no idea where she is. I have no idea.</p> | <p style="text-align: right;">Page 207</p> <p>1 process of law? 2 A. According to the very limited material that 3 I have -- and it's really limited, it's only a small 4 fraction of what I would expect to have in this file -- 5 and with the benefit of knowing that Ms. Shchada has 6 given testimony at Shwaysh's trial, I can say that 7 there is a grave chance that she was denied due 8 process both because she alleged to have been abused 9 in custody and this abuse was not inquired -- this 10 allegation was not inquired. She actually alleged 11 that she was abused, intimidated, and coerced to sign 12 statements. Allegations of rape, threats, threat to 13 arrest her mother, forced to sign, and so on. 14 Q. I'm sorry. Did you say allegations of rape 15 or allegations of -- 16 A. Of threatened rape. 17 Q. -- of threatened rape? 18 A. Of threatened rape. Right. 19 And -- and since she has pleaded -- she has 20 pleaded guilty as part of a plea bargain, there was 21 no evidential hearing whatsoever. 22 Q. What was the date of her plea? 23 A. It's the 20 -- April 29th, 2004, which 24 means that both Sana'a and Kahira have testified 25 at Shwaysh's trial before their trial was over, in</p> |
| <p style="text-align: right;">Page 206</p> <p>1 I don't know her. 2 Q. She -- she's -- she's a Palestinian resident; 3 is that right? 4 A. I have no idea. 5 MR. HILL: Objection. Lack of foundation. 6 Q. BY MR. YALOWITZ: Are you aware that 7 Palestinian residents carry ID cards that -- that 8 the Palestinian Authority issues? 9 A. With the consent of the civil administration, 10 yes. But if she was released under some kind of 11 a prisoners' release thing, she might be deported. 12 I don't -- I have no idea. 13 Q. Do -- do you think the Palestinian Authority 14 would be able to find her? 15 A. I don't know. 16 Q. Do you have the case of Sana'a Mohammed 17 Shchada before you? 18 A. Yes. 19 Q. And do you have the -- your notes about her 20 case as well? 21 A. Yes. 22 Q. Now, based on the evidence you have reviewed, 23 pertaining specifically to the case of Sana'a Mohammed 24 Shchada, do you believe, to a reasonable degree of 25 certainty, that Ms. Shchada was actually denied due</p> | <p style="text-align: right;">Page 208</p> <p>1 contravention to the predominating judgment at that 2 time in the Israeli civilian courts, which, as I 3 explained, prohibit accomplices testifying before 4 their own trials conclude. 5 Q. Do you know her counsel? 6 A. I do not know her counsel. But according 7 to the name, it's a woman, Ahlam Hadad. 8 Q. Ahlam Hadad. 9 A. But I don't -- you know what? I'm not sure. 10 I think that -- 11 (Inaudible comment by Mr. Mishnayot.) 12 Q. BY MR. YALOWITZ: Mr. Kaufman reported 13 that Ahlam Hadad is an extremely experienced 14 attorney with whom he is familiar and who he 15 knows to represent many individuals facing trial 16 at the JMC. 17 Do you have any reason to doubt that 18 statement? 19 A. I don't know Attorney Hadad. 20 Q. That would be a "no"? 21 A. That would be I don't know her and I can't 22 make any judgment about her. 23 Q. Fair enough. 24 Other than the allegation of coercion, was 25 there anything else that you noticed that gave you</p> |

1 due process concerns?
 2 A. I just defer to the general due process
 3 failures that I find in the military court system
 4 as a system.
 5 Q. And as with the case of Kahira Sa'id Ali
 6 Sa'adi, do you have any explanation for why Sana'a
 7 Mohammed Shchada did not raise allegations of coercion
 8 in her own case?
 9 A. I would -- I -- I guess that the reason for
 10 that was the desire to plea. That was probably one --
 11 this is just an assessment that I make, that this
 12 was one of the cards they had in the negotiations,
 13 that they would raise it in court. But I don't know.
 14 Q. One of the cards that the defendant had?
 15 A. Yeah. I don't know. This is just --
 16 Q. So should we talk about Abdullah Barghouti?
 17 A. Yes.
 18 Q. Have you heard of Mr. Barghouti before your
 19 work in this case?
 20 A. I guess I have like any Israeli.
 21 Q. Tell me what -- just -- just, like, maybe
 22 in New York we know more about John Gotti than you
 23 might. Just tell -- tell -- for the benefit of the
 24 New Yorkers who are on the jury, just tell us who
 25 Abdullah Barghouti is.

1 MR. HILL: Objection. Lack of foundation.
 2 THE WITNESS: I -- I'm --
 3 MR. HILL: The witness can respond.
 4 THE WITNESS: I'm not able to say something
 5 that is not based on newspaper clips. And even that
 6 I cannot do because it was 2003 or '4 or '5 when he
 7 was detained and -- and tried. So it will be improper
 8 for me to start giving him crowns. But he was a major
 9 wanted guy, a guy that was wanted by the security forces
 10 for being an important figure in Palestinian militant
 11 organizations.
 12 Q. BY MR. YALOWITZ: Wanted for being a
 13 terrorist?
 14 A. Wanted for being engaged -- yeah, for being
 15 a terrorist.
 16 Q. Wanted for many years for being a terrorist?
 17 A. I don't know.
 18 Q. It was big news when he was arrested?
 19 A. You really think that I remember what the
 20 news were like ten years ago?
 21 Q. I don't know.
 22 A. Well --
 23 Q. I'm asking.
 24 A. I don't know. I don't remember.
 25 Q. You lived here. I didn't. So I'm trying

1 to find out.
 2 A. Okay. So I don't remember. You know, in
 3 Israel, we have big news every other day.
 4 Q. Based on the evidence you've reviewed,
 5 pertaining specifically to the case of Abdullah
 6 Barghouti, do you believe, to a reasonable degree
 7 of certainty, that Mr. Barghouti was denied due
 8 process of law?
 9 A. If, in previous cases, I said that I have
 10 a small fraction of the file, here I would say that
 11 I have almost one digit percent of what I would expect
 12 to be -- to have -- to have in the file. It is very
 13 difficult for me to answer the question.
 14 I know for sure, not because of -- of this
 15 file, but because of the next one that we will deal
 16 with, that Mr. Barghouti was interrogated under the
 17 necessity doctrine and -- and that he was -- physical
 18 means of interrogation were used against him. He was
 19 detained for three months before an indictment was
 20 served.
 21 Q. Mr. Sfard, what I'd like to do is do how we
 22 did before, where you give an answer to the question
 23 and then we can -- I promise you you'll get a chance
 24 to --
 25 A. Okay.

1 Q. -- say all the basis. I really do promise
 2 that. I don't -- I don't want to be rude. I don't
 3 want to cut you off. But I need to make my record.
 4 A. There were due process failures in his case.
 5 Q. And you believe, to a reasonable degree of
 6 certainty, that he was actually denied due process of
 7 law?
 8 A. That -- I would say it in my language. There
 9 were due process failures in his case.
 10 Q. Well, I appreciate there's a distinction.
 11 Can you tell me -- I'll just -- I'll just
 12 try it one more time.
 13 Can you tell me: Is it your opinion,
 14 to a reasonable degree of certainty, that Abdullah
 15 Barghouti was actually denied due process of law?
 16 A. In order to make that, I need more information
 17 about his case. As I said, unlike other cases in
 18 this case, the amount of evidence that I have is even
 19 smaller, which still suggests to due process failures.
 20 If that amounts -- if -- does that translate to he
 21 did not get a fair trial? I guess that it might.
 22 Q. Is -- is that the highest degree of certainty
 23 you can provide me with regard to the case of Abdullah
 24 Barghouti?
 25 A. Yes.

1 Q. Thank you.
 2 Okay. Now, please tell me, in summary
 3 fashion, and then we can -- well, no. Let me strike
 4 the question.
 5 Please tell me the due process concerns
 6 that you have with the case of Abdullah Barghouti.
 7 A. Well, as I began to say, he was interrogated
 8 under the necessity means, which means that he was
 9 physically abused and maybe mentally. I do not know
 10 what exactly were the methods that were used against
 11 him because the evidence as to the methods were denied
 12 from plaintiffs and defense in this case. I do not
 13 have the --
 14 Q. I'm sorry. What did you mean by "plaintiffs"?
 15 A. I mean your clients.
 16 Q. Oh, you mean the -- the evidence was not
 17 available in the court --
 18 A. No.
 19 Q. -- file?
 20 A. Was not available to us here. We --
 21 Q. I -- I don't understand.
 22 A. Okay. Let me -- let me start over.
 23 In the next case, Case No. 7, of Ibrahim
 24 Hamed, we've received a judgment, a ruling of the court,
 25 which described the evidence that was presented there.

1 And in the -- in the ruling, the judges have commented
 2 that one or two of the GSS interrogators of Abdullah
 3 Barghouti that was a prosecution witness in the other
 4 case, in Ibrahim Hamed's case, confirmed that he,
 5 meaning Abdullah Barghouti, was interrogated according
 6 to the necessity defense, meaning that they have used
 7 physical means and other means in interrogation.
 8 What are the exact means except a slap or
 9 slaps that they have -- that the judges have affirmed to
 10 have happened, we do not know, because their testimonies
 11 in Ibrahim Hamed's case were held in closed doors and
 12 we do not have the transcripts of their testimonies.
 13 So I would expect that, in Abdullah
 14 Barghouti's file, we will find more information
 15 about this. Unfortunately, we do not have the GSS
 16 file that -- that would teach us what happened in
 17 the interrogation room. So --
 18 Q. What else besides coercive interrogation
 19 tactics do you have in mind when you say that you
 20 believe that Abdullah Barghouti was actually denied
 21 due process?
 22 A. No, this is the main thing, the coercive
 23 methods of interrogation.
 24 Q. Okay.
 25 A. Then --

1 Q. May I ask about that before we move on?
 2 A. Sure.
 3 Q. In the case of Abdullah Barghouti, was --
 4 were his post-arrest statements admitted as evidence
 5 against him?
 6 A. No. He pleaded guilty.
 7 Q. So -- so --
 8 A. Without a bargain [sic].
 9 Q. So the -- without a -- without a plea bargain?
 10 A. That's right.
 11 Q. And -- and then he made a lengthy statement
 12 to the court?
 13 A. That's right.
 14 Q. He said: "I do not regret even one of the
 15 acts that I carried out, and the court is -- and the
 16 court knows that I taught dozens of engineers who will
 17 do the work better than me."
 18 MR. HILL: Objection.
 19 Q. BY MR. YALOWITZ: Is that right?
 20 MR. HILL: Lack of foundation.
 21 The witness can respond.
 22 THE WITNESS: That -- that's what is written
 23 in the transcript. Yes.
 24 Q. BY MR. YALOWITZ: And when he's speaking
 25 of engineers, he's speaking of people who make bombs

1 to blow up civilians; right?
 2 A. That's what I --
 3 MR. HILL: Objection. Lack of foundation.
 4 THE WITNESS: That's what I --
 5 MR. HILL: The witness can respond.
 6 THE WITNESS: -- understand from that.
 7 Q. BY MR. YALOWITZ: And -- and I -- I take
 8 it -- we've discussed this before.
 9 But I take it you categorically reject that
 10 tactic; right?
 11 A. Yes.
 12 Q. You believe it's a war crime; right?
 13 A. I think it's even a crime against humanity
 14 when it's con -- when it is conducted as part of a
 15 large-scale attack.
 16 Q. Do you think that -- do you -- is it your
 17 opinion that the attacks against Israeli civilians
 18 during the Second Intifada was sufficiently wide
 19 scale that it constituted crimes against humanity?
 20 A. Yes, I do.
 21 Can I say something?
 22 Q. Of course.
 23 A. This is where a society is measured, in
 24 providing due process and a fair trial to the most
 25 heinous crimes, even crimes against humanity, to

1 the most heinous alleged perpetrators.

2 Q. Do -- do you have any doubt that Abdullah
3 Barghouti is guilty of the crimes he admitted?

4 A. This is not something that I have assessed
5 or had the mandate to assess. And since I do not
6 have the full file, I cannot answer this question.

7 Q. Did -- did you -- did the counsel for the
8 Palestinian Authority and the PLO provide you with
9 Abdullah Barghouti's testimony in this case?

10 A. Testimony? You mean --

11 Q. Were you aware that Abdullah --

12 A. There was -- there was -- there was a request
13 that I saw here and the transcript of a Magistrate
14 Court in Jerusalem hearing, in which the -- the lawyers
15 for plaintiffs asked for a contempt of court order
16 against Mr. Barghouti.

17 Q. Were you aware that Mr. Barghouti was brought
18 to give testimony so that the jury could hear for itself
19 what he had to say?

20 A. I only was aware of what I said, that there
21 was a -- I under -- all I saw was a request for legal
22 assistance and then a -- a transcript of a motion for
23 a contempt of court order against Mr. Barghouti for,
24 if I understood correctly, not willing to give
25 testimony --

1 Q. Did -- did you --

2 A. -- to testify.

3 Q. Were you aware that a videotape was made
4 of Mr. Barghouti's -- the questioning of Mr. Barghouti
5 in connection with the request that the plaintiffs in
6 my case made to question him?

7 A. No, I was not aware.

8 Q. And -- and did -- who -- who did you work
9 with -- who did you work with in preparing for today?
10 Mr. Hill?

11 A. Mr. Hill.

12 Q. Did Mr. Hill show you that videotape of
13 Abdullah Barghouti?

14 A. No, he didn't.

15 Q. Should we go to Ibrahim Hamed?

16 MR. HILL: I'm not sure -- maybe it's been
17 asked and I missed it. But I don't know if the witness
18 has fully answered the question about due process with
19 respect to this individual or not.

20 MR. YALOWITZ: Well, it's a little unorthodox,
21 but --

22 MR. HILL: Well, you promised him that you'd
23 give him a chance to do so. So I -- I don't know if
24 that was done or not. That's the only --

25 MR. YALOWITZ: I -- I --

1 MR. HILL: -- objection I guess I'm raising.

2 Q. BY MR. YALOWITZ: I thought that -- I
3 thought that we talked about it.

4 But is there anything else that you feel we
5 should discuss about Abdullah Barghouti?

6 A. Only the general assertions that I've made
7 about the system as a whole.

8 Q. Thank you.

9 A. Yes. Mr. Hamed.

10 Q. Mr. -- do we say "Hamed"?

11 A. "Hamed."

12 Q. "Hamed." I don't know if we need to write
13 that down, but it's okay if you did.

14 Do you have the Hamed file before you?

15 A. I do.

16 Q. You've reviewed it before?

17 A. I have.

18 Q. Based on the evidence that you've reviewed,
19 pertaining specifically to the case of Ibrahim Hamed,
20 do you believe, to a reasonable degree of certainty,
21 that Mr. Hamed was actually denied due process of law?

22 A. I do.

23 Q. I'm sorry?

24 A. I do.

25 Q. What is the evidential basis for your opinion?

1 A. Okay. This is the only case in which some
2 at least of the GSS file has been provided and that
3 show -- and what we see from the file is, as a whole,
4 first of all, that the case took six years. The
5 prosecution has received extensions, continuances,
6 time and again to provide investigation material to
7 the defense. So the only case in which, you know,
8 the whole 21 files, where the defense apparently
9 asked for the GSS memorandums.

10 Q. Mr. Sfard, I apologize for interrupting.
11 But if I could just ask you about that topic, and
12 then we'll --

13 A. Okay.

14 Q. -- we'll continue to others.

15 Would that be helpful to you, or did you --

16 A. I don't mind.

17 Q. -- want to continue?

18 A. I don't mind. Go on.

19 Q. Okay. The -- I mean, I don't want to debate
20 with you any further about the absence of requests for
21 GSS files. I think we've --

22 A. Covered that.

23 Q. I think we've covered that.

24 So with regard to the GSS files in the Hamed
25 case --

1 A. Yeah.

2 Q. -- is it your impression that -- that counsel
3 for Hamed and counsel for the prosecutor [sic] kind of
4 fought it out over what was going to be produced over
5 a long period of time?

6 A. I was not under the impression that they
7 fought it out. But I was under the impression that
8 the prosecution failed to provide. And every -- every
9 time there was a revelation that more material was not
10 handed over, and then the trial was stopped for months
11 and months.

12 And, eventually, the -- the defense attorney
13 asked the tribunal to recuse itself because it keeps
14 on providing continuances to the prosecution. So the
15 case -- the -- the actual evidence hearings took place
16 almost three years after the indictment was filed.

17 Q. And do I have it right that the court itself
18 expressed displeasure at the continuances?

19 A. I think it has, but --

20 Q. Okay.

21 A. -- but, nevertheless, provided them.

22 Q. Okay. Please -- please continue with other --
23 in addition to the delay, anything else --

24 A. So --

25 Q. -- specific that you felt raised a due

1 process concern?

2 A. So Mr. Hamed was interrogated for five
3 consecutive days with -- almost with no rest,
4 according to the GSS memorandums. Interrogations
5 that took 16 hours and then half hour rest and then
6 another 16 hours and so on and so forth, at the end
7 of which he incriminated himself. He kept -- he kept --
8 he kept his innocence plea -- or not a plea. He kept
9 saying that he was innocent or not incriminating himself
10 until that fifth or sixth day. If you want the dates,
11 he was detained on -- in the morning of May 23rd, 2006.
12 And then he was -- and he has incriminated himself on
13 the 29th of May, 2006.

14 He -- later he was -- he was denied a lawyer
15 for at least 11 days. I don't know if, after that,
16 he saw a lawyer. But, nevertheless, we have documents
17 that show that he was denied a lawyer for at least 11
18 days. And he saw a lawyer only after he incriminated
19 himself. He has alleged --

20 Q. I'm sorry. Did -- were his statements to
21 the GSS used as evidence in his trial?

22 A. Yes.

23 Q. And did he allege that those statements have
24 been coerced?

25 A. I do not have the transcript of the trial,

1 unfortunately. I only have bits and pieces of it.
2 Much of it is -- is missing. I know, by reading
3 the ruling of the trial, that -- that the -- the
4 judgment -- that -- in which the judges describe
5 the cross-examination of GSS interrogators, that
6 in the cross-examination, his defense attorney has
7 alleged that they have abused him, just as they
8 have been confronted with an allegation that they
9 have abused prosecution witnesses. And they have
10 confirmed -- some of them have confirmed to have
11 used physical means, both against Abdullah Barghouti,
12 a prosecution witness, and against Mohammad Arman,
13 also a prosecution witness.

14 Q. And did -- did the defense succeed in getting
15 the post-arrest statements suppressed on the grounds
16 of coercion?

17 A. You're referring to the defendant's detention
18 custody statements?

19 Q. Right. We're sort of jumping around a little
20 bit.

21 A. Yes.

22 Q. Why don't we start with the defendant --

23 A. But let -- that's simple.

24 Q. -- himself?

25 A. None of the out-of-court statements were

1 suppressed.

2 Q. Okay. Did the -- did the defendant instruct
3 his counsel to tell the court that his view of the
4 court is that he doesn't recognize the competence
5 of the court to try him?

6 A. It did happen in some of those case -- cases.
7 I can't remember if in this case it happened. But --

8 Q. Mr. Kaufman reports that this happened on
9 the 30th of October, 2011.

10 A. 30th of October, 2011? I do not have a
11 transcript from October 30th, 2011.

12 Are you sure this is the date?

13 Q. Perhaps there's a typo?

14 A. Let's see.

15 Q. We'll have to check it.

16 Why don't we -- why don't we assume that
17 Mr. Kaufman has accurately transcribed something --

18 A. Okay.

19 Q. -- but has perhaps has misrecorded the date.

20 If it turns out that our assumption is incorrect, then
21 our discussion will not be shown to the jury.

22 A. Though it seems odd that, after five years,
23 he would say that. But it's fine. It is possible.
24 The case started in 2006.

25 Q. So I think you said there were cases in

1 which the defendant instructed his counsel to tell
 2 the court that they rejected the court's competency?
 3 A. Yes. But if it happened in this case, it
 4 didn't -- it didn't -- it wasn't translated into an
 5 instruction not to hold a defense.

6 Q. All right. Anything else about the --
 7 anything else about the trial of Ibrahim Hamed that
 8 you want to point out as raising due process concerns?

9 A. Yes. So on June 5th, 2006 -- sorry -- yeah,
 10 June 5th, 2006, which is almost two weeks after his
 11 arrest and after he has incriminated himself, he
 12 withdrew his -- his previous confessions and asked
 13 to see a lawyer. This is how we know that he hasn't
 14 seen a lawyer. And he was told that he's denied.

15 But he withdrew his previous confessions,
 16 which -- which gives us a window, a peek into what
 17 you can get in the GSS file. If we would not receive
 18 the GSS file and we would have a skeleton file, like
 19 we have in the other 20, we would miss the fact that,
 20 at a certain point, the defendant has retracted from
 21 a previous statement and demanded to see a lawyer.
 22 So we see that here.

23 In his -- in a hearing at the Military Court
 24 of Appeals on July 20th of 2006 -- that's -- that's
 25 two months after he was detained -- there was a decision

1 of the first instance to prolong his detention. And
 2 he appealed. And he said in court -- he claimed that
 3 he was coerced to sign false statements and that he
 4 was attacked by the investigators after he refused
 5 to sign the statement.

6 Q. I'm sorry. I -- I was asking in -- you've --
 7 you've said that Mr. Hamed raised allegations of
 8 coercion?

9 A. Yes.

10 Q. Okay. In addition to his allegations of
 11 coercion --

12 A. Oh, okay.

13 Q. -- is there anything else that you believe
 14 supplies an evidential basis in his case for your
 15 conclusion that there is specific evidence raising
 16 due process concerns?

17 MR. HILL: Let me just object to the form.
 18 You don't mean to exclude anything that he's
 19 already testified to; right?

20 MR. YALOWITZ: Anything else.

21 MR. HILL: Okay.

22 MR. YALOWITZ: Right.

23 Q. BY MR. YALOWITZ: We've already gone over
 24 one thing. Rather than have -- I mean -- and I mean
 25 no -- I mean no disrespect.

1 MR. HILL: No, but I think he --
 2 THE WITNESS: Okay. I just said --

3 MR. HILL: My -- my objection is that he's
 4 mentioned more than one thing and you're not trying
 5 to limit his testimony now, are you?

6 Q. BY MR. YALOWITZ: Go ahead.

7 A. Okay. I mentioned several things, including
 8 the length of the trial and all -- all those six years
 9 he was in detention. So --

10 Q. Fair enough.

11 A. -- the idea of --

12 Q. You did -- you did mention --

13 A. I mentioned that. I mentioned the coercive
 14 measures allegedly used against him. I mentioned
 15 the coercive measures allegedly used against other
 16 prosecution witnesses.

17 Q. Right. So in addition to the things you've
 18 already mentioned, is there anything else you want
 19 to mention?

20 A. Let me see.

21 Q. Right. I'm not trying to trick you --

22 A. No, no. Okay.

23 Q. -- into agreeing --

24 A. I'm -- I'm --

25 Q. -- with something.

1 A. I just want to make sure I don't -- I'll
 2 just mention the fact that he was eventually convicted
 3 based on out-of-court statements that were admitted
 4 and the general due process failures that I again
 5 and again refer to.

6 Q. All right. And -- and I'm -- I mean, look,
 7 I'm -- I'm trying to get through it. You've got a
 8 lot of things that you're telling me that were not
 9 in your report. And so I'm trying to let you describe
 10 all of your opinions so that we understand them. And
 11 I honestly have said that I'll assume that your general
 12 comments will apply to --

13 A. Okay.

14 Q. -- all of the cases.

15 A. Okay.

16 Q. And -- and you -- you know, we don't know
 17 each other that well. But when I say that, I'm not
 18 screwing around. So --

19 A. Okay.

20 Q. So I'm trying to get through the evidence
 21 with you. And -- and I know it's -- would you like
 22 a break? Would that help us focus? Shall we pursue
 23 it now? What's your pleasure?

24 A. I'm -- I'm okay. I mean, if you want to
 25 have a break, I'm willing to have a break.

1 Q. All right. I -- let's take a break.
 2 A. Okay.
 3 (Recess from 4:04 p.m. to 4:10 p.m.)
 4 Q. BY MR. YALOWITZ: I just wanted to ask you
 5 one thing about Abdullah Barghouti.
 6 He was convicted of being a bomb maker; right?
 7 A. I'll take your word for it. He was convicted
 8 of so many things that I -- I guess he was. Yes.
 9 Q. And this necessity defense that we've been
 10 talking about, have you sometimes heard it called the
 11 "ticking time bomb"?
 12 A. Yes. There were -- in -- in the past,
 13 before the High Court has ruled out the five physical
 14 techniques, the language used by the GSS was "ticking
 15 bomb." Now they're talk -- now it's "necessity."
 16 Q. Same concept?
 17 A. I never equated between the two. But this
 18 is the concept that the High Court has used. This is
 19 why today we're talking about "necessity."
 20 Q. I mean, I'm -- I'm not asking you to agree
 21 that the concern that there is a ticking bomb actually
 22 is a necessity. You -- I --
 23 A. I may agree.
 24 Q. You may. I don't know.
 25 A. I may agree. But I don't think that -- or

1 I'm positive that statements made in such -- under
 2 such conditions can be an evidence in a court of law.
 3 It's one thing to -- to do something that is illegal,
 4 but you have a defense. And it's completely a different
 5 thing to use it in a court of law in order to convict
 6 someone.
 7 Q. Should we go to Ahmed Barghouti?
 8 A. Yeah. I -- I would have to say that I do
 9 not accept that torture is ever permissible. And the
 10 idea of a ticking bomb is never, like in the Hollywood
 11 movies, a sure thing. So I do not accept the idea that
 12 there can be a -- a framework in which it is permissible
 13 to torture anyone.
 14 Q. I have to say I was surprised at your last
 15 answer, because I thought that would have been your
 16 opinion.
 17 A. Well --
 18 Q. But anyway --
 19 A. As we -- as we discussed before, not every
 20 abuse is -- amounts to torture.
 21 Q. Oh, fair enough. Okay. I understand what
 22 you're saying.
 23 Torture is never acceptable?
 24 A. That's right.
 25 Q. Period, full stop?

1 A. I -- this is -- I -- I cannot agree with
 2 you more.
 3 Q. And do you know -- just before -- I can't
 4 help it. But do you know, before we leave Barghouti,
 5 what the coercive tactics that were alleged --
 6 A. Against --
 7 Q. -- against -- against [sic] Abdullah
 8 Barghouti?
 9 A. I do not, because the detailing of those
 10 techniques have not been provided to us.
 11 Q. Did -- did his counsel argue that they
 12 amounted to torture, as opposed to cruel, inhuman,
 13 and degrading treatment?
 14 A. Mr. Barghouti pled guilty with no bargain,
 15 as -- as I explained before. And there was no --
 16 almost no defense with merits.
 17 Q. And -- and did -- did the counsel of Hamed
 18 argue that coerced statements by Barghouti and others
 19 that were offered in the Hamed case were the product
 20 of torture, as opposed to cruel, inhuman, and degrading
 21 treatment?
 22 A. What we have is the ruling of the court.
 23 And from that, I learned what the parties have argued,
 24 because we do not have their summations. And from
 25 what the court described, the reference of the defense

1 was to suppression of evidence rather than to the
 2 classification of whether it's torture or degrading
 3 or inhumane treatment or just abuse that is neither.
 4 Q. And -- and -- I -- okay. I think I have it.
 5 Thank you.
 6 Now, let's go to Ahmed Barghouti. Do you
 7 have the Ahmed Barghouti file?
 8 A. Yeah.
 9 Q. Do you believe, to a reasonable degree of
 10 certainty, based on the evidence that you've reviewed
 11 pertaining specifically to Ahmed Barghouti's case,
 12 that he was actually denied due process of law?
 13 A. Since you want me to be short, I will say
 14 that, regarding his investigation, I do have -- I
 15 do believe that he was denied due process. His trial
 16 was, as far as I understand, very short, no evidential
 17 hearings. He pleaded guilty. And -- and so I don't
 18 have much to say about the trial. I can say that he
 19 alleged physical abuse in interrogation. But since he
 20 pled -- pleaded guilty, there was no inquiry of that.
 21 Q. And other than his allegation of physical
 22 abuse, what other evidential basis do you have for
 23 your opinion concerning due process with regard to
 24 Ahmed Barghouti?
 25 A. I know that -- I -- well, in this case, the --

1 the missing material is -- is the vast portion of the
 2 case. We only have the indictment -- amended indictment
 3 and the judgment. So I cannot say much. I -- I can
 4 say that -- no, I said already.

5 Q. Thank you.

6 Do you -- did you see, in the file, that
 7 Ahmed Barghouti had sentenced -- called for the death
 8 penalty against Ariel Sharon and said he regretted
 9 nothing?

10 A. I remember that.

11 Q. Should we talk about Mohammed Messalah?

12 A. Yes. One second. Yeah.

13 Q. Do you have the Messalah file before you?

14 A. I have the parts of it that were given to me.

15 Q. You have everything that was given to you?

16 A. Yes.

17 Q. Based -- and you've reviewed it in the past;
 18 right?

19 A. I'm sorry. I'm not on the right one.

20 Yeah. And I have, yes.

21 Q. All right. Let me know when you're ready.
 I don't want to rush you.

22 A. Okay. I'm -- I'm with you.

23 Let -- let me just say for the record, what
 24 I have is an amended indictment, a verdict based on

1 a plea, and one police statement. That's all I have.
 2 This is a very, very slim file that we've received.
 3 And, of course, it doesn't represent the whole file.

4 Q. This is a case that -- that ended early in
 5 a plea bargain; is that right?

6 A. Yes.

7 Q. Now, based on the evidence that you've
 8 reviewed, pertaining specifically to the Mohammed
 9 Messalah case, do you believe, to a reasonable degree
 10 of certainty, that Mr. Messalah was actually denied
 11 due process of law?

12 A. It is difficult for me to make assertions
 13 on this case because I have a very limited part of
 14 the file. So I defer to the general points that
 15 I made and also to the fact that, in this case,
 16 the plea of guilt was made by the -- by the defense
 17 attorney and -- sorry. I -- I have nothing to add
 18 to what I said.

19 Q. You're not saying it's a violation of due
 20 process for the defense attorney to communicate the
 21 plea of guilt?

22 A. No, no, no, no. I -- I was -- I thought
 23 something. I was wrong. I take it back. Fine.

24 Q. Okay.

25 A. Okay.

1 Q. Very good.

2 Is there anything you'd like to add, other
 3 than your general statements which we've -- which
 4 we've agreed amongst ourselves apply to all 21 of
 5 the defendants?

6 A. Not in this case. I don't have anything to
 7 add.

8 Q. Okay. Thank you.

9 Now then, let's go to Mahmoud [sic] Sami
 10 Ibrahim Abdallah.

11 A. Yes.

12 Q. Do you have the -- the files you've been
 13 provided before you of Mahmoud [sic] Sami Ibrahim
 14 Abdallah?

15 A. Yeah.

16 Q. And based on the evidence you've reviewed,
 17 pertaining specifically to the case of Mahmoud [sic]
 18 Sami Ibrahim Abdallah, do you believe, to a reasonable
 19 degree of certainty, that Mr. Abdallah was actually
 20 denied due process of law?

21 A. Here I also want to make clear, for the
 22 record, that all we've received was a statement,
 23 out-of-court police statement, an amended indictment,
 24 a verdict, and a sentence. This is all we have --
 25 all I have.

1 From the little that I have, I can say that
 2 Mr. Abdallah was in pre-trial detention for two months.
 3 He has implicated himself 19 days after he was detained.
 4 If we had the full file, maybe we would see that he'd
 5 implicated himself earlier. But from what I see in
 6 the file that I have, his first self-incrimination is
 7 19 days after he was detained. And so all the things
 8 that I've said about the GSS interrogations apply and,
 9 of course, the general things that I've said before.

10 Q. This is a case that ended also in a plea
 11 bargain; right?

12 A. Yes. With no evidence heard.

13 Q. And at sentencing, the accuse -- the accused
 14 stated that he had committed the offenses for which he
 15 had been convicted because of the occupation; right?

16 MR. HILL: Objection. Lack of foundation.

17 THE WITNESS: This is what the -- did he --
 18 what did he say?

19 Q. BY MR. YALOWITZ: Sure. Why don't we get
 20 you oriented.

21 A. Yeah, but I --

22 Q. Take a moment.

23 A. I don't think I have --

24 Q. May 13th of '03?

25 A. What Bate number? I -- I -- I do not --

1 but go on. I don't have it. But --

2 Q. That's all right.

3 A. -- it might -- I mean, this is common for
4 people to say that, because of the occupation.

5 Q. All right. Fair enough. I think it's not
6 necessary. I think everybody understands the point.

7 A. Okay. Are we moving to Mr. Ghanem?

8 Q. "Ghanem."

9 A. "Ghanem." That's right.

10 MR. HILL: You guys are just clipping along
11 now. What were you worried about?

12 MR. YALOWITZ: Was that off the record?

13 MR. HILL: I don't know. If Brenda took
14 it down, it's on -- then it's on.

15 THE WITNESS: Mr. Ghanem, yeah.

16 Q. BY MR. YALOWITZ: All right. Let's -- let's
17 do the "yes" or "no" question first. And -- and -- and
18 then you'll give me your comments.

19 You -- you've reviewed the files that your
20 counsel has been provided in the case of --

21 A. Pharess.

22 Q. -- Pharess Ghanem; is that right?

23 A. Yes.

24 Q. Based on the evidence that you've reviewed,
25 pertaining specifically to the case of Pharess Ghanem,

1 do you believe, to a reasonable degree of certainty,
2 that Mr. Ghanem was denied actual due process of law?

3 A. I do.

4 Q. Please state your evidential basis for that
5 opinion.

6 A. I don't know where to start. Mr. Ghanem
7 has not confessed neither in court -- neither in the
8 investigation rooms, nor in court. He was convicted
9 based on out-of-court statements of prosecution
10 witnesses that were not cross-examined and corroborated
11 each other. The defense has agreed to -- to admit
12 out-of-court incriminating statements of alleged
13 accomplices eight times in eight different occasions,
14 if I remember correctly.

15 Q. Okay. May I just ask you about that one
16 piece of it?

17 A. Yeah.

18 Q. That -- that's the same technique we saw
19 earlier where -- where you -- you inferred that the
20 defendant was negotiating for a plea; is that right?

21 A. Yeah. Here we -- we -- we know for sure
22 that they have -- they were negotiating for a plea
23 because they say it in court.

24 Q. And -- and, ultimately, the parties were
25 not able to agree on a plea; is that right?

1 A. Yes. And what we see is that we have
2 a hearing after hearing that is scheduled for a
3 cross-examination of prosecution witnesses. And
4 every hear -- sorry. The parties, instead of
5 holding the -- the -- the cross-examination, file
6 more out-of-court statements and admit it to the
7 court file.

8 Q. Can I ask you one -- about one incident
9 that I read about in the file?

10 A. Yeah.

11 Q. I can't say I read the file.

12 A. Okay.

13 Q. Okay. On April 29th of '04, the defendant's
14 attorney said that his client would waive the right
15 to testify in his own defense, but by agreement with
16 the prosecution, the decision was not to corroborate
17 any prosecutorial evidence where the corroboration
18 was required; is that correct?

19 A. First of all, it is correct. And, second,
20 the -- the -- immediately after that, the -- the
21 parties say we -- and -- and I -- and I translate:

22 (Reading/translating.)

23 "It is our intention to make another attempt
24 to get to a plea bargain in -- in this file -- in this
25 case. And for that, we are asking a continuance. If

1 we will not get to a -- to a -- to an agreement until
2 the next hearing, then we'll ask for a continuance
3 for summations, for closing arguments."

4 Q. So -- so do you draw the inference, from the
5 evidence you've described, that the defendant's counsel
6 had made a strategic decision to try to get to a plea
7 bargain?

8 A. I am positive that he wanted to get to a
9 plea bargain. I cannot understand how waiving the
10 right to cross-examine a witness that implicates your
11 client is a reasonable thing to do in these -- under
12 these conditions.

13 Q. Did you -- do you -- do you know who -- who
14 the attorney was at this point? Was it Osama Saadi?

15 A. Yes. It's the only attorney in these files
16 that I know.

17 Q. And -- and what is your impression of Osama
18 Saadi?

19 A. I never saw him in trial. I know him as
20 a colleague. And so I can't make any judgments as
21 to his quality. But he's considered to be a good
22 and one -- and a central figure in -- among Palestinian
23 lawyers.

24 Q. By "central," you mean a prominent and
25 well-respected attorney?

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1 A. I don't know what "well-respected" means.
 2 But prominent and known.
 3 Q. And I think Mr. Kaufman had some comments
 4 about Attorney Saadi; is that right?
 5 A. Yeah. I read -- I read his comments.
 6 Q. And I -- I think he spoke about it at his
 7 deposition as well? Were you there?
 8 A. He -- he did.
 9 Q. Do you disagree with his comments?
 10 A. I will say the following, without commenting
 11 specifically on Osama Saadi.
 12 Tragedy is not when bad people do bad things,
 13 but when good people do bad things. And one of the
 14 reasons that I stopped going to military courts is
 15 because I was afraid that I will get accustomed to
 16 the practices in the military courts and will be
 17 one of those lawyers who is, instead of waging a
 18 fierce defense for their client, is fighting for
 19 a plea bargain and knowing that there is no real
 20 trial going on.
 21 So I don't know what exactly motivated
 22 Mr. Saadi when he has done what he has done in this
 23 case. I really don't. I'm just saying that the
 24 fact that he is a prominent, respected lawyer doesn't
 25 mean that, in the military court, he didn't do what

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1 is customary in the military courts.
 2 Q. This -- this technique that you've mentioned
 3 about agreeing to submission of evidence, is this
 4 something you've ever done in the civilian courts?
 5 A. Not if I thought that the evidence that
 6 we were submitting is to the detriment of my client.
 7 Q. Well, let me ask it again, because you kind
 8 of qualified it.
 9 Have you ever done it?
 10 A. If I ever asked for a continuance and, in
 11 order to get it, agreed to -- to -- to file evidence?
 12 I don't think I have ever done this.
 13 Q. No, I -- maybe I'm misunderstanding the
 14 technique. But --
 15 A. Okay. So let me explain it to you.
 16 In order for -- these cases take a long time,
 17 as you know. And these cases there's a -- there's a
 18 pressure to shorten the -- the period, to end the trial.
 19 Q. I'm familiar with such situations.
 20 A. Okay. So the parties do want to hold
 21 more negotiations, but a hearing is nearing. And so,
 22 eventually, without the consent of both parties, the --
 23 the tribunal will never agree to a postponement just
 24 because they want to hold negotiations.
 25 So the -- the defense attorney comes to

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1 the prosecutor and suggests that they will ask for
 2 a continuance. The prosecutor would say: Well, if
 3 you want us jointly to ask for a continuance, we will
 4 have to submit evidence and show that there is progress
 5 in the trial. That's more or less how it works.
 6 Q. And where have you seen that technique?
 7 A. In the military courts.
 8 Q. Have you ever seen it used in the civilian
 9 courts?
 10 A. I don't think that I have.
 11 Q. Have you ever seen Avigdor Feldman use it?
 12 A. Absolutely not.
 13 Q. Is it -- do you believe that it's -- it --
 14 do you believe that it is a violation of due process
 15 for counsel to use that technique in order to continue
 16 plea negotiations?
 17 A. If submission --
 18 Q. Can you just answer it "yes" or "no"?

19 MR. HILL: Objection.
 20 THE WITNESS: I -- yes, I think it's not a
 21 violation of the counsel -- it's the -- the -- if the
 22 evidence submitted is incriminating your client, then --
 23 and -- and you waive cross-examination and you don't
 24 have any other reason but you need a continuance, that
 25 would be a failure on the part of the defense to provide

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1 effective defense. And that would constitute a due
 2 process issue.
 3 Q. BY MR. YALOWITZ: Has that -- has -- have
 4 you ever expressed that opinion to a court?
 5 A. Specifically about this issue, about this
 6 practice?
 7 Q. About what you just described. Yeah.
 8 A. No.
 9 Q. Never in any of your 300 cases that you've
 10 filed regarding human rights violations?
 11 A. I have never filed a case against any --
 12 against this practice which I know of and -- and
 13 identified in some of these files.
 14 Q. Well, maybe I've given you an idea for your
 15 next case. We'll see. When we're together again in --
 16 A. Next time we meet.
 17 Q. -- New York, we'll see -- we'll see if you've
 18 done it then.
 19 Now, other than the things you've described
 20 with regard to Phareess Ghanem --
 21 A. Yeah.
 22 Q. -- and your general reservations, is there
 23 anything else about the Phareess Ghanem case that you
 24 feel implicates due process concerns?
 25 A. No.

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| <p style="text-align: right;">Page 245</p> <p>1 Q. Okay. Let's go to the case of Majid Al-Masri. 2 A. Yes. 3 Q. And -- and I -- I want to ask you if -- I 4 want to ask you two different questions about the case 5 of Majid Al-Masri. 6 The first question is: Do you believe that 7 the case of Majid Al-Masri raises due process concerns? 8 A. I do. 9 Q. And the second is: Do you believe, to a 10 degree of certainty -- to any degree of certainty, 11 that Mr. Al-Masri was actually denied due process 12 of law? 13 A. Can you repeat? 14 Q. Sure. The first question -- 15 A. Aah, issues. 16 Q. The first question is: Does it raise due 17 process concerns? 18 A. Concerns. 19 Q. The second question is: Do you believe, 20 based on the evidence you've reviewed, that to a 21 reasonable degree of certainty, Mr. Al-Masri was 22 actually denied due process of law? 23 Have you reached that conclusion? 24 A. I think he has been denied due process rights. 25 Q. Okay. Please tell me about your opinions</p> | <p style="text-align: right;">Page 247</p> <p>1 A. Right. 2 Q. And Nasser Aweis; right? 3 A. Yes. 4 Q. Mohammed Messalah; right? 5 A. Right. 6 Q. Mohammed Abdallah; right? 7 A. Right. 8 Q. And Ahmed Barghouti? 9 A. Yes. 10 Q. These are names we've heard before? 11 A. We have. 12 Q. And did -- did you evaluate the testimony 13 of those individuals in the file -- was -- was there 14 testimony actually in the file? 15 A. Their -- their testimony in court is not in 16 the file. 17 Q. Did -- did you -- 18 A. All I know about them, about their appearance 19 in court is from the judgment. 20 Q. And the judges concluded that the testimony 21 corroborated each other; right? 22 A. Yes. 23 Q. Okay. In addition to the -- well, continue. 24 What other things raised due process concerns, 25 in your view, in the case of Al-Masri?</p> |
| <p style="text-align: right;">Page 246</p> <p>1 with regard to Majid Al-Masri. 2 A. We have here another case of a defendant 3 that has not -- that has kept arguing for his innocence 4 both in the investigation and throughout the trial. 5 And he was convicted based on custody statements of 6 prosecution witnesses, who were allegedly accomplices. 7 One of them refused to testify. And eight others have 8 actually testified that what was ascribed to them, as 9 if they said in the investigation, is not true. And 10 their out-of-court custody statements were -- were 11 admitted to their truth. 12 Q. I'm sorry. Say -- just say the last part 13 again. 14 A. Eight prosecution witnesses have either 15 alleged that what they -- what their out-of-court 16 statements have said is not true or had a different 17 narrative on the stand. And their out-of-court 18 statements were used to incriminate Mr. Al-Masri. 19 Q. All eight? 20 A. Well, not all eight are relevant to the 21 Jaffa bombing of January 22nd, 2002. Some of them 22 were on two other allegations, other charges. 23 Q. Among the co-perpetrators, whose testimony 24 was relied on by the court in convicting Al-Masri, 25 were Ibrahim Abd Al-Hai; right?</p> | <p style="text-align: right;">Page 248</p> <p>1 A. I just want to add that Mr. Abd Al-Hai, who 2 was a prosecution witness in -- in Al-Masri's case, his 3 out-of-court statement was his plea in his own trial. 4 And he alleged that he has affirmed, in general, the 5 amended indictment that was filed against him in his 6 plea -- in his -- for his plea bargain. And the 7 implication of Al-Masri in that amended indictment was 8 one fragment of a -- of -- of a phrase in a very long 9 indictment. And he said that it was not read out to 10 him. So he basically rejected that he implicated 11 Al-Masri. I'll just say that, because this belongs -- 12 this is relevant to Al-Masri's engagement in the Jaffa 13 bombing. 14 Apart from the fact that most -- that his 15 conviction was based on out-of-court statements of 16 accomplices, that one of them did not even -- was not 17 even -- did not allow cross-examination. And apart 18 from the general assertions -- let me just check. 19 I don't think I have anything to say. No. 20 I'm sorry. It's five -- five witness -- 21 prosecution witnesses, not eight. One, two, three -- 22 sorry. I take it back. I was correct. Eight. 23 Q. Five who implicated him in the -- 24 A. Eight. 25 Q. -- Jaffa Street bombing?</p> |

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|--|--|
| <p style="text-align: right;">Page 249</p> <p>1 A. No. One implicated him of -- of the Jaffa 2 Street bombing.</p> <p>3 MR. HILL: For the record, I think you mean 4 a Jaffa Street shooting.</p> <p>5 THE WITNESS: Yeah.</p> <p>6 MR. HILL: Both --</p> <p>7 THE WITNESS: Jaffa Street shooting.</p> <p>8 MR. HILL: Both of you are doing it.</p> <p>9 THE WITNESS: Yeah, yeah, yeah, yeah.</p> <p>10 MR. HILL: It's that point in the day.</p> <p>11 THE WITNESS: Jaffa Street shooting. Yes.</p> <p>12 He was -- he was convicted of the -- of --</p> <p>13 of his knowledge of and involvement in the Jaffa Street 14 bombing on the basis of -- of Abd Al-Hai's plea of guilt 15 in his own trial, as I said. And the corroboration to 16 it, I have to say, is based on -- yeah, on other -- 17 other out-of-court statements of other witnesses.</p> <p>18 Q. BY MR. YALOWITZ: Do you have anything 19 further you want to mention about Majid Al-Masri, 20 or shall we move to Ali Mohammed Hamed Abu Halil?</p> <p>21 A. We can move to Abdel -- Ali Abu Halil.</p> <p>22 Q. Say that three times fast.</p> <p>23 A. Sorry?</p> <p>24 Q. Ali Mohammed Hamed Abu Halil, let me know 25 when you have his file.</p> | <p style="text-align: right;">Page 251</p> <p>1 the first page of the judgment. The court says: 2 (Reading/translating.) 3 "Unfortunately, I mean, on September 18th, 4 2005, the prosecution has filed its closing arguments 5 and, for some reason, the defense attorney has not filed 6 his. We have given more time. And, unfortunately, even 7 after that time, the -- the defense attorney did not 8 file the closing arguments."</p> <p>9 And two phones calls that were initiated by 10 the court secretary, where he was notified that, if he 11 will not file his closing arguments, it will be seen 12 like waiving the right to file them, didn't help. So --</p> <p>13 Q. Perhaps this suggested that he waived his 14 rights?</p> <p>15 A. He didn't even notify that he waived the 16 right.</p> <p>17 I think a court of law, a criminal court that 18 is faced -- I actually think there is a good ground for 19 appeal here. Because, as we said before, a defendant 20 in the military courts has a right to a counsel on the 21 expense of the court for any -- if he is facing more 22 than ten years in prison. The court was bound to stop 23 the trial, get a lawyer or get an official waiver.</p> <p>24 Q. Didn't we talk earlier about submissions, 25 oral submissions and written submissions? Wasn't</p> |
| <p style="text-align: right;">Page 250</p> <p>1 A. Yeah.</p> <p>2 Q. Mr. --</p> <p>3 A. Yeah.</p> <p>4 Q. Mr. Abu Halil was convicted of co-perpetrating 5 homicide by way of procuring materials for explosives 6 used in a suicide bombing on a bus; isn't that right?</p> <p>7 A. In Jerusalem. Yes.</p> <p>8 Q. And so I'm going to ask you my two questions.</p> <p>9 My first question is: Do you have due process 10 concerns about his case?</p> <p>11 A. Yes.</p> <p>12 Q. My second question is: Do you have -- what 13 degree of certainty do you have that his due process 14 rights were violated?</p> <p>15 A. I'm certain that some of his due process 16 rights were violated and others I have suspicion that 17 they have.</p> <p>18 Q. Why don't -- why don't you tell me about the 19 ones that you're certain of?</p> <p>20 A. Well, I think that he has his -- he has -- 21 he had violation of his right to assistance by counsel, 22 ineffective representation, counsel that forgot to file 23 summations and did not file summations even after he 24 was given more extensions from the court.</p> <p>25 I read out from his -- from the judgment,</p> | <p style="text-align: right;">Page 252</p> <p>1 that you and me? We talked about that; right?</p> <p>2 A. We talked about so many things today.</p> <p>3 Q. And -- and didn't you tell me earlier today 4 that written submissions are not always filed?</p> <p>5 A. But here we know that there were. We know 6 that there was a decision to file written submissions. 7 And the prosecution has filed them.</p> <p>8 Q. And so, if the prosecution files written 9 submissions, the defense is required to?</p> <p>10 There's a rule that says that?</p> <p>11 A. There is no doubt in my mind that there is 12 an official decision by the court to -- with deadlines 13 when would the prosecution file its closing arguments 14 and when will the defense.</p> <p>15 Q. Do you have that?</p> <p>16 A. Yeah, I have it.</p> <p>17 Q. All right.</p> <p>18 A. August 4th, 2005, the court -- court's 19 decision:</p> <p>20 (Reading/translating.)</p> <p>21 "Prosecution will file its closing summations 22 in writing to the court docket and to the defense 23 by September 19th, 2005. And defense will file its 24 summations in writing by October 20th, 2005."</p> <p>25 And then we hear in the -- we read in the</p> |

1 judgment that the defense has failed to do that, failed
 2 to do it after another extension was given, and failed
 3 to do it after telephone calls to the defense attorney.
 4 And the court says:

5 (Reading/translating.)

6 "So I have to -- to decide without defense
 7 closing arguments."

8 Q. And -- and then the court concurred with the
 9 defendant's line of defense?

10 A. The court has --

11 Q. It seems like it was pretty crafty of that
 12 defense lawyer.

13 A. The defense -- the court has convicted the
 14 defendant in 19 charges of complicity to aiding and
 15 abetting homicide and two -- two attempts -- aiding
 16 and abetting and attempt -- attempted homicide.

17 Was that the defense line? Maybe it was.

18 Q. I'm -- I'm asking you, yeah.

19 Kaufman reports that the court rendered its
 20 judgment wherein it concurred with the defendant's
 21 line of defense.

22 A. The defend -- the line of defense was that
 23 he is -- he should be convicted of aiding and abetting
 24 rather than the completed crime. Yeah.

25 Q. So it turns out he got what he was arguing

1 for even without written submissions; right?

2 A. That doesn't cure the fact that he was denied
 3 effective defense.

4 Q. Let me just ask it again.

5 It turns out he got what he was arguing for
 6 even without submitting a written submission --

7 A. Yes.

8 Q. -- right?

9 MR. HILL: Objection. Asked and answered.

10 Q. BY MR. YALOWITZ: Other than what we've
 11 discussed, did you have any other due process
 12 concerns in the question -- in the case of Ali
 13 Mohammed Hamed Abu Halil?

14 A. I just want to mention that he was in custody
 15 for two and a half months. We have no record from the
 16 interrogation phase. The sentence reasoning was signed
 17 eight months after the sentence hearing -- sentencing
 18 hearing.

19 Q. Is that a due process violation?

20 A. It's a -- it's a concern.

21 Q. Okay.

22 A. Absolutely a concern. If a court of law
 23 hears arguments and then takes a long time to -- to
 24 adjudicate, that is a concern.

25 Q. We have that phrase in New York, "justice

1 delayed is justice denied."

2 A. I think it's British, the source. It --
 3 we have -- we have the same phrase in Hebrew, which
 4 is very well -- just the same.

5 Q. We -- we're fond of it in Virginia.

6 A. Yeah.

7 Q. Now, anything else that you want to add
 8 about --

9 A. No.

10 Q. -- Ali Mohammed Hamed Abu Halil?

11 A. No.

12 Q. All right. So then let's go to Mr. -- he's
 13 got a really long name, this fellow -- Abd Al-Rahman
 14 Zahar Youssef Abd Al-Rahman Mekdad.

15 Should we just call him Mekdad?

16 A. Mekdad. Mr. Mekdad.

17 Q. Let me know when you're ready.

18 A. Yeah.

19 Q. First of all, do you have an opinion about
 20 whether Mekdad is innocent or guilty?

21 A. I do not have -- I do not have any opinion.

22 Q. Do you -- do you -- are you certain that
 23 Mekdad was denied due process?

24 A. I'm certain that he was denied several due
 25 process rights.

1 Q. And do you -- do you think that those due
 2 process denials were material to his conviction?

3 A. I don't know.

4 Q. So describe the due process violations that
 5 you believe -- or describe the due process concerns
 6 that you have with regard to Mekdad.

7 A. Okay. Length of detention pre-trial and
 8 during-trial detention, the quality of representation
 9 he has received, and the general issues that we've
 10 discussed.

11 Q. Do you have the July 27th, 2006, proceedings
 12 in the Mekdad case?

13 A. Can you tell me what is the -- what has
 14 happened that day?

15 Q. Closing arguments.

16 A. July 27th --

17 Q. 2006.

18 A. Yeah. No. Six -- May 16 -- May 16th of 2006.

19 Q. This is the closing speech of defense counsel?

20 A. Wait a minute. It might be a different day.

21 Let me just look at this. Yeah, I have on -- instead
 22 case number --

23 Q. 2271?

24 A. Yeah. I have it.

25 Q. Under '04?

1 A. But it's May 16, 2006.
 2 Q. The parties agree to allow the court to
 3 decide the defendant's guilt based on the evidential
 4 materials submitted in the past?
 5 A. What I have is a May 16th, 2006, transcript
 6 in which the defense complains that they didn't get
 7 enough time to prepare their summations.
 8 Q. Let me see. I might have it. Bear with me.
 9 This one is so good I might have just pulled it out.
 10 What do you know? I'm sorry.
 11 September 28 of 2006. Try that. Arguments
 12 for sentencing.
 13 A. Aah, for sentencing. I thought you said
 14 closing arguments.
 15 Q. My -- my error. I apologize.
 16 A. Okay.
 17 Q. Closing speech in the arguments for
 18 sentencing.
 19 A. For sentencing, yes, 27th of July, 2006.
 20 Q. Kaufman reports on the defense counsel's
 21 speech. I'll read you what he has to say, and you
 22 tell me if he's fairly reporting.
 23 "The defendant's case is that he does not
 24 wish me to make closing submissions and that all the
 25 facts contained in the indictment are correct and

1 that his case is that he murdered and wounded all the
 2 people mentioned in the indictment, but he did so in
 3 the context of his struggle against the occupation.
 4 It is the defendant's right to do this. Therefore,
 5 although he murdered, he believes he is not pleading
 6 guilty."
 7 Is that consistent with what you're reading?
 8 A. Was that a quote or a paraphrase? Because
 9 these were -- this is not the way it reflects here.
 10 Q. Why don't you say it how you're reading it?
 11 A. The defense attorney, all he said was:
 12 (Reading/translating.)
 13 "I cannot detail the position of -- of the
 14 defendant as he will do. Hence, my closing arguments
 15 will be the defendant's last words."
 16 Q. And then what does the defendant say?
 17 A. Then he says:
 18 (Reading/translating.)
 19 "I admit to have killed people in Israel.
 20 But I'm not guilty. It was my right. It was -- it
 21 was a reaction to those tens -- tens of thousands that
 22 you have killed of us without a reason, just" --
 23 And he also says:
 24 (Reading/translating.)
 25 "I promise you, the judges, if there will

1 be peace, we will be friends in peace. And if you
 2 will continue the same way, I will be fighting. And
 3 I also promise that one day I will sit in your place
 4 and judge you for all the things you've done to the
 5 Palestinian people. I promise you that I will get
 6 out of prison and the punishment you're giving me is
 7 a big" --
 8 Q. "Honor"?
 9 A. (Reading/translating.)
 10 -- "honor to my wife and to my son -- and
 11 to my son" --
 12 Q. "Age three"?
 13 A. (Reading/translating.)
 14 -- "age three. And I hope that, by the time
 15 he grows up, there will be peace."
 16 Q. "And if there will be war"?
 17 A. (Reading/translating.)
 18 "If there will be war, as you are accustomed
 19 to killing children and babies, I hope from him to be
 20 a better fighter and to struggle more than me."
 21 Q. I asked you a question with regard to Mekdad
 22 that I hadn't asked with regard to any of our previous
 23 ones. So let me do it as a group. If we have to, we
 24 can go back.
 25 Mekdad is our fourteenth or thirteenth?

1 A. Fourteen.
 2 Q. In the prior 13 that we discussed, you had
 3 identified due process concerns and questions.
 4 In any of those 13, is it your view that the
 5 due process concerns or violations you've identified
 6 were material to the convictions?
 7 MR. HILL: Objection. Misstates the
 8 testimony.
 9 But the witness can respond to the question.
 10 THE WITNESS: I cannot make any, again,
 11 overall assessment as to the impact of the due process
 12 failures on the conviction.
 13 I would like to add, at this opportunity,
 14 that many of the due process failures may have impacted
 15 severely certain parts of the conviction or certain
 16 facts that have been asserted by the court in their
 17 judgments. So, you know, if we're dealing with 21
 18 cases that 17 of them have been concluded in plea
 19 bargains or pleas without bargains, it -- it would be
 20 impossible -- and given the system and the due process
 21 concerns in the system and the due process concerns
 22 in the specific cases, it would be impossible to rely
 23 on facts that have been asserted by the courts in
 24 those cases, regardless of the question of whether
 25 the conviction can stand or whether miscarriage of

1 justice has occurred.

2 Q. BY MR. YALOWITZ: Well, let me ask you --
3 and I appreciate your comment. And you're welcome
4 to make comments as we go along.

5 But my question is: On any of the 13 that
6 we've discussed previously, is it your opinion that
7 the due process concerns or violations that you've
8 identified were material to the convictions?

9 MR. HILL: Objection. Asked and answered.

10 THE WITNESS: I couldn't make that assessment.

11 Q. BY MR. YALOWITZ: And is that true of all
12 21?

13 A. That I can't make the assessment?

14 Q. Yes.

15 A. There are -- let's say that there are cases
16 in which I have more material that I can say that the
17 due process concerns are so -- are grave -- graver
18 than others.

19 Q. So have we talked about any of those yet?

20 A. Well, I think that Pharess Ghanem's case is --
21 is one that -- let's put it that way. If I was a judge,
22 I wouldn't sleep at night, if I would be a judge in that
23 case.

24 Q. So I think, if you were a judge, you wouldn't
25 sleep at night at all; right?

1 A. I don't know.

2 Q. In -- in the case of Pharess Ghanem, is it
3 your opinion that the due process concerns you described
4 were material to his conviction?

5 A. They were -- directly affected his conviction.
6 I remind you that, in Pharess Ghanem's case, the
7 admission of out-of-court statements was the sole
8 base for his conviction.

9 Q. Anybody besides Pharess Ghanem?

10 A. If you want, I can go through the 13 cases.
11 I -- Pharess Ghanem is one that I -- you know, it
12 stands out for me now because we went through them.

13 I think the cases that involve allegations
14 of -- of abuse are such that the directness of the
15 effect of the due process concerns on conviction is
16 material. So if I have to point to two groups, these
17 would be the groups.

18 Q. The -- I'm sorry. The first was solely --

19 A. I would say --

20 Q. -- solely out-of-court statements, and the
21 second was coercive statements that were -- that were
22 admitted into evidence over objections that they were
23 obtained through coercive techniques?

24 A. Yes.

25 Q. Okay. I mean, have I fairly stated the --

1 A. Yeah. These -- these two groups and -- and --
2 and convictions that are based on statements made by
3 witnesses that were not available for cross-examination
4 for whatever reason. In these cases, the due process
5 concerns affect directly the conviction. In other
6 cases, in other concerns, affect indirectly -- may
7 affect indirectly convictions.

8 Q. May affect?

9 A. May affect. But in all of them, it affects
10 the fact-finding process.

11 Q. Now, let's go to Hilmi Abd Al-Karim Mohammed
12 Hamash.

13 A. Oh, it's here. Fifteen, yeah.

14 Q. This is another defendant who was convicted
15 of charges that included the January 29th, 2004, suicide
16 bombing of the No. 19 bus; right?

17 A. Right.

18 Q. Do you recall this defendant said at
19 sentencing that he committed the crimes in retaliation
20 for what happened -- happened to Khan Yunis?

21 MR. HILL: Objection. Lack of foundation.

22 THE WITNESS: Sorry? Where -- where is that
23 in his --

24 Q. BY MR. YALOWITZ: In his sentencing
25 hearing.

1 MR. HILL: Same objection.

2 THE WITNESS: I'll just take your word for it.

3 Q. BY MR. YALOWITZ: Okay. All right.

4 A. Yeah.

5 Q. Why don't we -- why don't we identify the due
6 process concerns that you have with regard to the case
7 of Hilmi Abd Al-Karim Mohammed Hamash.

8 A. Mr. Hamash was represented by the same lawyer
9 that represented Mr. Mekadad and Mr. Ahmed Salah, No.
10 16, and Mr. Ma'ali, No. 17. They were all prosecution
11 witnesses in his case. It seems odd that a defense
12 attorney will represent a prosecution witness against
13 a defendant that he represents. I do not say that I
14 can assert with certainty that there was malpractice
15 here, but it calls for a grave concern. On the face of
16 it is problematic.

17 Mr. Mekadad was prosecution witness No. 4.
18 And Mr. Ahmed Salah was prosecution witness No. 7.
19 And Mr. Ma'ali was prosecution witness No. 3. All
20 implicated Mr. Hamash in the charges that he was
21 charged with.

22 Q. In addition to the general concerns that
23 you have and the concern about one lawyer representing
24 multiple defendants, tell me what other concerns you
25 have.

1 A. Length of his detention. He was detained
 2 for, I think, three years. And lack -- again, the
 3 same phenomena that we saw at Mekdad's case, the --

4 Q. The plea bargain strategy?

5 A. Defense does not file summations.

6 Q. Aah, summations.

7 A. Summations. And -- just a second. Let me
 8 make sure that I didn't omit anything.

9 Yeah, I mean, on April 3rd, 2006, parties
 10 notified the court that all those guy -- all those
 11 out-of-court statements of the other defendants that
 12 are Cases No. 14 and 16 and 17 will be filed with the
 13 consent of the defense. So that means that defense
 14 waived its right to cross-examination against the
 15 implicating -- implicating witnesses.

16 Q. So, in Israel, are defendants allowed to
 17 mount a joint defense?

18 A. Defendants in the same charge sheet? Yes.

19 Q. And -- and how about defendants in separate
 20 cases, are they also allowed to try to stick together
 21 and mount a joint defense?

22 A. They're allowed. Attorneys have a ethical
 23 duty not -- not to enter into a situation which they
 24 are in conflict of interest.

25 Q. And if -- if attorneys are in a conflict

1 Q. Did the lawyer who engaged in the joint
 2 representation cross-examine any of his clients?

3 A. I do not think so. As I -- if I recollect,
 4 he agreed to file their statement.

5 Q. Sitting here today, do you know whether
 6 those -- was it four defendants?

7 A. Yeah.

8 Q. Do you know whether those four defendants
 9 had a joint defense arrangement or not?

10 A. I don't know.

11 Q. Thank you.

12 A. But the only reason they were convicted
 13 is because of the out-of-court statements that they
 14 have consensually allowed to be admitted one against
 15 the other. That -- that's a very -- I will only say
 16 that it's a very peculiar strategy, if we have a joint
 17 defense, that means that we'll all go to prison together
 18 and be convicted.

19 Q. Okay. Did any of those four take guilty
 20 pleas?

21 A. Mr. Hamash admitted to the facts, admitted
 22 in the sense -- by way of allowing the incriminating
 23 out-of-court statements to be admitted. Mr. Salah
 24 has done the same. Mr. Ma'ali had a plea bargain.
 25 And Mr. Mekdad had admitted the out-of-court statements

1 of interest situation, can they be disciplined?

2 A. Yes.

3 Q. And does the court conduct the discipline?

4 A. No. But the court would notify the Bar.

5 Q. And if an attorney is found to have engaged
 6 in an inappropriate ethical violation -- I guess that's
 7 redundant -- the attorney is found to have engaged in
 8 an unethical violation, are the consequences of that
 9 publicly reported?

10 A. No. I mean, they are reported without the
 11 identity of -- of the -- without disclosing the identity
 12 of the lawyer involved.

13 Q. So -- so the lawyer has an obligation, when
 14 entering into a joint defense arrangement, to avoid
 15 conflicts; right?

16 A. That's right.

17 Q. And I take it the lawyer has an obligation
 18 to explain to the client the nature of the potential
 19 conflicts that can arise in a joint representation;
 20 right?

21 A. Right.

22 Q. And so do you know, in the cases you've
 23 described here, what the lawyer who engaged in the
 24 joint representation said to his clients?

25 A. I do not know.

1 of his accomplices on his own.

2 Q. So these -- these were four defendants who
 3 did not maintain their innocence; right?

4 A. They have maintained. Three of them have
 5 maintained their innocence in the sense that they did
 6 not plead guilty.

7 Q. Sure. It's a terminology issue.

8 A. Well, we're all about terminology.

9 Q. Fair enough. So let me ask it -- let me ask
 10 a better question.

11 A. Sure.

12 Q. These are not defendants, any of them, who
 13 went to the court and testified and said "I didn't do
 14 this"; right?

15 A. I don't think any of them has testified at
 16 all.

17 Q. And -- and at their sentencing, a number
 18 of the defend -- these four defendants made statements,
 19 indicating that they were proud of what they did and
 20 they would do it again or words to that effect; right?

21 A. You have read out to me what Mr. Mekdad
 22 has said or what the transcript says that he has said.
 23 And you have read out to me what Mr. Hamash has said,
 24 I think. We discussed that. I'm not sure actually.

25 But I do not remember exactly what every one

1 of them has said. If you want, we can go through it.
 2 I don't -- I don't remember. It's 21 files.

3 Q. All right. It's a lot of files --

4 A. Yeah.

5 Q. -- and it's in -- late in the afternoon.

6 MR. HILL: When you get to a stopping point --

7 THE WITNESS: Yeah, let's --

8 MR. HILL: -- let's take a break.

9 THE WITNESS: Let's make a break. I just --
 10 can we have a break?

11 MR. YALOWITZ: "Tov."

12 (Recess from 5:22 p.m. to 5:27 p.m.)

13 Q. BY MR. YALOWITZ: We were on Hamash?

14 A. Yeah.

15 Q. And -- okay.

16 A. And I said that he didn't -- that -- that --

17 Q. Well, let me ask you a question.

18 A. Sorry.

19 Q. Okay. With regard to Mr. Hamash, my notes
 20 reflect -- I'll tell you what my notes reflect. And
 21 then I'm going to ask you if you would like to add
 22 anything.

23 A. Okay.

24 Q. Okay. My notes reflect -- reflect you had
 25 concerns that he had the same lawyer as Mekdad and

1 two other defendants in other cases, that you were
 2 concerned about the length of his detention, that
 3 you were concerned that there was a lack of written
 4 summations --

5 A. Right.

6 Q. -- and that you were concerned about the
 7 out-of-court statements of his co-conspirators --

8 A. Right.

9 Q. -- that were admitted against him.

10 A. And I add to that, very shortly, that he
 11 was detained for two and a half months pre-indictment
 12 and that the sentencing -- the sentence reasoning was
 13 provided eight months after the sentencing hearing.
 14 And mind you, you can only appeal after you get the
 15 reasoning. So that also pushes back the appeal timing.

16 Q. And which, if any, of these five concerns
 17 you've mentioned would you consider material to the
 18 outcome in the Hamash case?

19 A. Well, the admission of -- of his accomplices'
 20 out-of-court statements, of course. And -- and I don't
 21 know if -- I don't remember if he implicated himself.
 22 But if he did, so also the investigation occurrences.

23 Q. That one -- that one is a possible thing that
 24 would need to be explored?

25 A. Yes.

1 Q. There's -- there's no evidence in the file
 2 that -- that he made allegations of coercion; right?

3 A. He -- there was -- there was no evidence
 4 phase in this case in the sense of he did not take the
 5 stand, the prosecution witnesses did not take the stand,
 6 so no.

7 Q. And his counsel at no time said "I need a
 8 suppression hearing because my clients' post-arrest
 9 statements were coerced"; right?

10 A. "Clients" in plural, yes, he didn't.

11 Q. He didn't say that about any of his four
 12 clients?

13 A. No.

14 Q. Okay. Maybe I'll remember that when we come
 15 to the other ones so I don't have to ask you again.

16 Let's -- let's go to Ahmed Salah Ahmed Salah
 17 Ma'ali [sic]. That's like Sirhan Sirhan, I guess;
 18 right?

19 A. Here it is. Yeah.

20 So Mr. -- do you want to pose a question?

21 Q. Do you know who Sirhan Sirhan was?

22 A. Sorry?

23 Q. Sirhan Sirhan?

24 A. No. Sirhan Sirhan --

25 Q. Yeah.

1 A. -- from the Jungle Book?

2 MR. HILL: I know it's late in the day, but
 3 why don't we pose relevant questions.

4 MR. YALOWITZ: I think it's highly relevant.

5 Q. BY MR. YALOWITZ: Now, with regard to Ahmed
 6 Salah Ahmed Salah, would you please describe --

7 A. We're -- we're at Mohammed Issa Ma'ali, no?

8 I'm sorry. Maybe I flipped too fast.

9 Q. Well, we can do Mohammed --

10 A. He's No. 17.

11 Q. -- Issa Mohammed Ma'ali and then we can --

12 A. Okay.

13 Q. -- come back to Ahmed Salah Ahmed Salah,
 14 if you wish.

15 A. Okay.

16 Q. Okay. So we're on Mohammed Issa Mohammed
 17 Ma'ali?

18 A. Yeah.

19 Q. Would you please describe the due process
 20 concerns that you have about Mr. Ma'ali's case?

21 A. Well, in Mr. Ma'ali's case, there was a very,
 22 very bizarre plea bargain, which includes him admitting
 23 to all counts and getting nothing in return. And even
 24 so, the court says that he's not bound by the -- by the
 25 plea bargain. I just don't get it. I don't understand

1 what the lawyer has done here. He has alleged --

2 Q. So -- so the substance of the plea bargain
3 was of concern to you?

4 A. It was -- the advocacy of his representation
5 is of concern to me. Because, in fact, without probably
6 understanding that, he pled guilty to all counts with
7 no bargain whatsoever. It is represented as a bargain.
8 But it -- the -- the prosecution -- the prosecutor says:

9 (Reading/translating.)

10 "We have reached a plea bargain in the
11 framework of which the defendant will ask to retract
12 from his plea of innocence and will admit to the
13 indictment. And the parties will argue as to the
14 sentence."

15 And then the court says:

16 (Reading/translating.)

17 "I am -- I want the defendant -- I am
18 explaining to the defendant that the court is not
19 bound by the bargain." [sic]

20 (Inaudible comment by Mr. Mishnayot.)

21 THE WITNESS: But that's not a bargain [sic].
22 This is -- this is an admission of guilt, clear and
23 simple.

24 So it seems like the -- the defense attorney
25 has presented to his client the procedure as if it's

1 a bargain [sic] when, in fact, it's just a plea of
2 guilt.

3 MR. HILL: The record should reflect that
4 the judge made a comment in Hebrew. I don't know what
5 that was.

6 THE WITNESS: The judge made a comment --

7 MR. YALOWITZ: I think the judge's comment

8 was in English.

9 MR. HILL: Oh, well, then I miss -- didn't
10 understand it.

11 MR. YALOWITZ: Did you get the comment,
12 Brenda?

13 THE COURT REPORTER: No.

14 MR. YALOWITZ: The comment was that the
15 court always has the right to reject an agreement.
16 And Mr. Sfard, I think, agrees with that.

17 THE WITNESS: Yes.

18 MR. HILL: And let me just say for the record,
19 we're in the last half hour of the seven hours allotted
20 by the rule. It's late in the day. Some of us are
21 traveling tonight. I would appreciate it if everyone
22 would just let Mr. Yalowitz pose questions. And
23 Mr. Sfard can answer it. And we can move on.

24 THE WITNESS: The next concern that I have
25 is that the defendant has alleged in court that the

1 escort guards have abused him and made a search on him
2 when he was naked. And the defense attorney said that
3 he tried to understand why they did it. And they said
4 so that he will learn how to behave.

5 He also charged that he was threatened before
6 the court and that the guard said: I will take care
7 of you after the court. My concern is that the -- the
8 judges, upon hearing this, have not done anything but to
9 say in a decision -- and I'm referring to September 27,
10 2004:

11 (Reading/translating.)

12 "We are convinced that the prison authorities
13 will behave according to the law and assume that what
14 was done, if done, will be examined."

15 That's it. Apart from these two things
16 and the issue of the -- of the "joint defense," quote,
17 unquote, and the general things, I do not have any
18 other.

19 Q. BY MR. YALOWITZ: Do you -- which of these
20 items do you consider, if any, material to the
21 conviction?

22 A. Taking into account that the alleged abuse
23 of the defendant took place -- let me just double-check
24 that -- yes. On the same day that the defendant has
25 pled guilty, I would say that both or all -- all due

1 process concerns that I have raised have a direct,
2 rather than indirect, effect on conviction.

3 Q. Do you -- when I use the word "material,"
4 do you understand what -- what I mean by that?

5 A. I prefer "direct" and "indirect." Because
6 I don't know if indirect is not material. It can be
7 material.

8 Q. So it's your opinion that all of the items
9 you've raised with regard to Mohammed Issa Mohammed
10 Ma'ali -- Ma'ali are --

11 A. I'll just add one more thing. And -- and,
12 you know, I didn't refer to Mr. Kaufman's report today.
13 But some of his assertions regarding the cases have
14 really made me puzzled. In this case, he said:

15 "Nothing in the materials with which I have
16 been supplied suggests that ... his guilty plea was
17 anything other than genuine." (As read.)

18 Now, in any other guilty plea, I would --
19 I would not say anything. But in this guilty plea,
20 that is presented as a plea bargain, I would say
21 that any defense or criminal lawyer, not just defense
22 lawyer, would say that something irregular happened
23 here, irregular at least. Apart from that, I have
24 nothing to add about Mr. Ma'ali.

25 Q. Okay. And you believe that all of the items

1 that you've described are material?

2 Do I have that right?

3 A. As I said, I -- I thought they were. They
4 had a direct effect on conviction. I do not -- I do
5 not know to say to what degree.

6 Q. All right. Is it fair to say you're not
7 offering an opinion that any of these items were
8 material?

9 A. I said that I think these items had an
10 effect on the conviction. Whether conviction would
11 have happened without them is a speculation which
12 I cannot make.

13 Q. And is that true of all the 21 items?

14 A. Twenty-one files?

15 Q. Yes.

16 A. I never asked myself "what if."

17 Q. So we -- we need to come back to Ahmed Salah
18 Ahmed Salah.

19 A. Okay. Just a second. That's No. 16; right?

20 Q. Correct.

21 A. Yeah.

22 Q. Do you have Ahmed Salah Ahmed Salah's file
23 before you?

24 A. I do.

25 Q. And tell me the due process concerns that

1 you have with regard to Ahmed Salah Ahmed Salah.

2 A. I have the due process concerns that I had
3 regarding Mr. Mekdad and Mr. Ma'ali and Mr. Hamash.

4 Q. The joint representation?

5 A. The joint representation.

6 Q. Please continue.

7 A. He was also detained for two and a half
8 months. And we have -- we do not have the documentation
9 of what happened during those two and a half months.

10 Q. Pre-indictment detention?

11 A. Pre-indictment. He was detained for two
12 and a half years trial -- pending-trial detention.

13 His counsel has agreed to submit all evidence against
14 him. Most of it are statements of his other clients.

15 Just as a matter of antidote, the court
16 did not allow him to shake his hand -- his father's
17 hand in court. And the defense did not file written
18 submissions. Probably Attorney Awdeh doesn't believe
19 in written closing arguments.

20 Q. Anything else?

21 A. No.

22 Q. Why don't we turn to Ahmed Mohammed Ahmed
23 Sa'ad.

24 A. Mr. Sa'ad's detention was very lengthy, two
25 and a half months pre-trial and two and a half years

1 pending trial. In this case, his -- he's one of the
2 four -- no. Sorry. He's not one of the four joint
3 defense team. But he was also represented by the same
4 defense attorney who has pled, on his behalf, guilty
5 to a charge that he did not want to be pled guilty for
6 and, later on, asked the court to retract.

7 Q. And the court permitted him to do that?

8 A. Yes.

9 Q. So I think we could agree that error
10 definitely was not material to the conviction?

11 A. No. But it reflects on the quality of --
12 of representation that he has received.

13 Q. "No" meaning you agree with me on materiality?

14 A. I agree with you.

15 Q. Okay. Please continue.

16 A. We do not have the GSS material, just like
17 in the other 20 cases.

18 Q. That would be one of your general --

19 A. Yes.

20 Q. -- reservations?

21 A. I will not repeat them. So --

22 Q. You may, but we have an understanding.

23 A. Okay. So this is all I have.

24 Q. Okay. Is it your opinion that the pre-trial
25 detention or the detention pending trial was material to

1 the outcome of the case? Or would that be speculation?

2 A. That would be speculation.

3 Q. And do I have it right, that's your view on
4 all 21 cases?

5 A. You mean the length of detention?

6 Q. No.

7 A. Or do you mean what happened during detention?

8 Q. That your view -- well, is it your view that

9 any of the 21 -- do you have an opinion on whether any
10 of the 21 cases would have come out differently absent
11 the due process violations and concerns that you believe
12 exist?

13 A. It would be a completely different trial.

14 And I do not know how it would end.

15 Q. Okay. That's helpful.

16 Please turn to the case of Ibrahim Abd Al-Hai.

17 A. Yes.

18 Q. Okay. Would you please describe the due
19 process concerns you have with regard to Abd Al-Hai's
20 conviction?

21 A. The length of his pre-trial detention I'm
22 not certain of. Because what I have is, I know that
23 he was detained on March 3rd, 2002, and the indictment
24 was served August 29th of 2002. That's six months. It
25 is possible. But if it's -- if that is the case, that

1 is a very long pre-trial detention. So I don't know
 2 if it's a mistake or if it's actually the case.

3 Q. What else?

4 A. This case ended with a plea bargain. There
 5 was no evidence hearing whatsoever. And I do not have
 6 any specific things to say about his trial.

7 Q. You're -- you're not suggesting that the fact
 8 that there was a plea bargain, that's not a due process
 9 concern?

10 A. No. I'm saying that there was a waiver on
 11 cross-examining witnesses, which might be of whatever
 12 reasons that I do not know of.

13 But it was -- I have -- let me -- let me say
 14 the -- the following in general about plea bargains.
 15 A plea bargain is something that is legitimate and it
 16 is done in every jurisdiction that I know of. A plea
 17 bargain that sends your client to 21 life sentences
 18 is very peculiar, because there's nothing to lose from
 19 waging a fierce defense. If you don't get, in a plea
 20 bargain, something that can be -- that can be of benefit
 21 to your client, then you have just waived for nothing
 22 your right to cross-examine witnesses and to examine
 23 the -- the evidence.

24 So I am suspicious when I see plea bargains
 25 that send people to consecutive life sentences.

1 Q. As a matter of law, is the death penalty
 2 available in cases of terrorism like the 21 that
 3 we're looking at?

4 A. Yes. It's a dead letter, but it's in the law.

5 Q. And so does a plea bargain definitely avoid
 6 any chance of death penalty?

7 A. Not in these cases, because in none of them
 8 did the prosecution state that it is planning to ask
 9 for the death sentence.

10 Q. Is that something that needs to be charged
 11 at the outset of the case?

12 A. In the -- in the Israeli civilian courts,
 13 definitely. I can check it, but I'm almost positive
 14 that in the military court system as well. If you want,
 15 I can check. You have the -- we have the -- the order.
 16 If you want, I can --

17 Q. Do you think you could check that?

18 Well, why don't we --

19 A. We can do it --

20 Q. -- consult with each other at the break?

21 All right.

22 MR. HILL: For the record, I think we have
 23 about ten minutes left in the seven hours. So let's
 24 proceed, please.

25 MR. YALOWITZ: Well, are you -- are you going

1 to cut it off after seven hours?

2 MR. HILL: Well, no, but I would like to get
 3 done --

4 MR. YALOWITZ: You'd like to --

5 MR. HILL: -- as soon as we can.

6 MR. YALOWITZ: -- keep going?

7 MR. HILL: Yes, please.

8 MR. YALOWITZ: Okay. Fair enough.

9 THE WITNESS: Can I ask something off record
 10 procedural?

11 MR. HILL: Let's go off.

12 MR. YALOWITZ: Yeah.

13 (Brief discussion held off the record.)

14 Q. BY MR. YALOWITZ: Please tell me about
 15 the case of -- please tell me about the due process
 16 concerns you have with regard to the case of Bashar
 17 Barghouti.

18 A. I do not have any specific concerns regarding
 19 that case. I refer to the --

20 Q. Your general --

21 A. -- general --

22 Q. -- reservations?

23 A. -- general reservations and to the fact that
 24 he was in pre-trial detention for a month and a half.

25 Again, it is reasonable to assume that he was denied

1 access to a lawyer and that whatever confessions he
 2 made there had a direct effect on his conviction, also
 3 on his defense strategy.

4 Q. Anything else?

5 A. No.

6 Q. Please tell me the due process concerns, if
 7 any, in addition to your general reservations that you
 8 have about the case of Uzz-a-Din Hamamra.

9 A. Okay. I can't find it, but I'll just use
 10 my -- my notes.

11 Q. Please go ahead.

12 A. Okay. So my concerns here are the length of
 13 detention, the -- the waiver to cross-examine witnesses,
 14 and the decision not to -- oh, thank you -- not to bring
 15 evidence for the defense. Here it is.

16 Q. Do you think it's a violation of due process
 17 for the defendant to elect not to put on a case?

18 A. It's a concern. It's a concern. And it's --
 19 and we should take in mind that he pled not guilty.
 20 So he was -- he maintained his innocence. So waiving
 21 his right to cross-examine and waiving his right to
 22 bring evidence seems to me like another one of those
 23 cases where the strategy was to plea but didn't --
 24 but failed.

25 Q. Or it could be a good goat case?

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1 MR. HILL: I'm sorry. I didn't hear the
 2 question. What was the question?
 3 Q. BY MR. YALOWITZ: It could be a good goat
 4 case; right?
 5 MR. HILL: A good goat case?
 6 THE WITNESS: We didn't get to you telling
 7 me the joke. So I don't know.
 8 MR. YALOWITZ: All right. Let's --
 9 MR. HILL: Let's get a question, please.
 10 Q. BY MR. YALOWITZ: That is a question.
 11 A. I don't know what it means.
 12 Q. Okay.
 13 A. Apart from this and my general assertions,
 14 I do not know -- because I have a very partial file,
 15 I do not know when the indictment was filed. Sorry.
 16 I know when the indictment was filed. I do not know
 17 when he was arrested. So I can't say what -- what
 18 was the length of his pre-trial detention. And I
 19 don't know what happened in the investigation room.
 20 Q. You mentioned the length of his detention
 21 during trial?
 22 A. I said that there's a concern. He was
 23 detained for two and a half or three years. I know
 24 that more than two years because a request to extend
 25 his detention by six months has been lodged with the

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1 Military Court of Appeals. Defense -- defense attorney
 2 agreed.
 3 Q. Why is that a --
 4 A. Concern?
 5 Q. -- due process concern for a defendant who
 6 is not pleading and not -- or who ends up not pleading?
 7 A. Well, first of all, a speedy trial is a
 8 due process right acknowledged by all human rights
 9 instruments.
 10 Q. We can agree on that.
 11 A. And especially when a trial is conducted
 12 while the defendant is in custody. That generates
 13 pressure on the defendant.
 14 Q. It generates pressure to plead; right?
 15 I mean, isn't that part of the concern?
 16 A. Sorry?
 17 Q. Isn't that part of the concern?
 18 A. That's part of the concern. Absolutely.
 19 Q. All right. I'm sorry. I interrupted you.
 20 Please continue.
 21 A. No, I don't think I have anything to add.
 22 Q. Okay. You've described all of the due process
 23 concerns you have about Uzz-a-Din Hamamra?
 24 A. Yes.
 25 Q. Okay. Now I want to ask you one more line

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1 of questions, and I don't expect it to take very long.
 2 You and I met before today; right?
 3 A. Yeah.
 4 Q. You were with us at Mr. Kaufman's deposition;
 5 right?
 6 A. Right.
 7 Q. What was your role at Mr. Kaufman's
 8 deposition?
 9 A. I advised counsel for the defense.
 10 Q. And were you looking things up for Mr. Hill
 11 and Mr. Satin as they were asking questions?
 12 A. Looking things up? What do you mean?
 13 Q. I thought I noticed you pulling documents
 14 up on the iPad to help them with their questions.
 15 A. I hope I did help them with the questions.
 16 I didn't -- I was looking at the iPad when certain
 17 documents were handed to Mr. Kaufman and I wanted to
 18 know what it's about. And Mr. Hill has uploaded them
 19 on his iPad.
 20 Q. You translated for Mr. Hill and Mr. Satin?
 21 A. During the deposition?
 22 Q. Yes.
 23 A. No.
 24 Q. I thought I noticed you whispering in their
 25 ear and showing them what place --

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1 A. Well, it's -- it's interpret --
 2 MR. HILL: Hold on. The conversation --
 3 the communications are privileged. So don't say what
 4 you were telling us.
 5 Q. BY MR. YALOWITZ: You were interpreting
 6 for them on-the-fly? It -- it gets back to the
 7 translation, interpretation thing. It was a bad
 8 question.
 9 A. It was -- it was definitely the quality of
 10 interpretation that is accorded in the military courts
 11 on-the-fly.
 12 Q. Do you -- you're being self-deprecating;
 13 right?
 14 A. I'm not sure what "deprecating" means.
 15 Q. All right. Well, anyway, you marked pages
 16 for Mr. Satin to use so that he could ask questions;
 17 right?
 18 A. I think that during the -- first of all, I
 19 did not mark for him any pages prior to the deposition.
 20 I have, if I remember correctly, passed a note when
 21 I thought that Mr. Kaufman was not accurate or things
 22 of that sort.
 23 Q. You wrote out questions for him to ask; right?
 24 A. Never.
 25 Q. You wrote on Mr. Hill's pad; right?

1 A. No. There were two iPads. One was --
 2 Q. No, no. His -- his yellow notepad --
 3 A. Aah.
 4 Q. -- that he has in front of him.
 5 Is that right?
 6 A. Yeah. In one or two occasions, I wrote on
 7 the yellow pad.
 8 Q. You whispered in his ear; right?
 9 A. I whispered once or twice in his ear.
 10 Q. You huddled up with him at every break?
 11 A. "Huddled up"? If I understand you correctly,
 12 then I had communication with him.
 13 Q. Private --
 14 A. Private --
 15 Q. -- communication?
 16 A. -- communication with him and Mr. Satin during
 17 the break.
 18 Q. And you did that at the lunch break as well;
 19 right?
 20 A. Yes. But it was dedicated to lunch.
 21 Q. You -- I -- I counted that we were off the
 22 record for about two hours, two hours and 15 minutes
 23 roughly. Does that sound about right to you?
 24 A. If you counted, I trust you.
 25 Q. Thank you.

1 What -- and -- and you were helping them
 2 with their strategic thinking in -- during the course
 3 of the Kaufman deposition; is that right?
 4 MR. HILL: Objection. To the extent it
 5 calls for communications, I think I'll instruct you
 6 not to answer.
 7 MR. YALOWITZ: Are you -- are you asserting
 8 work product over the conversations that you had with
 9 Mr. Sfard during the deposition of --
 10 MR. HILL: Read the --
 11 MR. YALOWITZ: -- Kaufman?
 12 MR. HILL: Read the question back.
 13 (Pending question read.)
 14 MR. HILL: Yes, I think it calls for a
 15 protected communication that doesn't fall within one
 16 of the exceptions. So I'll stand on my instruction.
 17 MR. YALOWITZ: All right.
 18 MR. HILL: Do you have any more questions?
 19 MR. YALOWITZ: I'm sorry?
 20 MR. HILL: Do you have any more questions?
 21 MR. YALOWITZ: Oh, indeed I do. Indeed I do.
 22 Q. BY MR. YALOWITZ: Did -- did you understand
 23 your role in the Kaufman deposition to be helping them
 24 with strategy?
 25 A. You know, to be honest, I don't recall what --

1 I didn't get any instructions as to my role. I was
 2 asked to come and to provide my opinion on things
 3 that emerge.
 4 Q. And did you, in fact, help them with their
 5 strategic thinking?
 6 MR. HILL: Objection. Lack of foundation.
 7 You can respond if you have an answer.
 8 THE WITNESS: I don't know if I'm supposed
 9 to answer or not.
 10 Q. BY MR. YALOWITZ: Yeah, you -- you --
 11 you're allowed to answer.
 12 A. The question was whether I helped in their
 13 strategic decisions?
 14 Q. Yes.
 15 MR. HILL: But you have to answer without
 16 revealing the communications.
 17 THE WITNESS: Okay.
 18 MR. HILL: So answer that if you can.
 19 THE WITNESS: I think there were issues in
 20 which I expressed my views that were more strategic
 21 than -- than specific, if that's the difference between
 22 specific and strategic.
 23 Q. BY MR. YALOWITZ: Were there situations
 24 in which you suggested the lines of questioning
 25 for them to pursue?

1 MR. HILL: Objection.
 2 Instruct him not to answer.
 3 Q. BY MR. YALOWITZ: Were there -- were
 4 there -- did you -- did you consider it as part of
 5 your role during the deposition to suggest lines of
 6 questions?
 7 Without telling me whether you did that or
 8 not, is that something that you considered was part
 9 of the job that you were retained to do?
 10 A. As I explained, I -- I didn't get any
 11 specific instructions. So there was no specific role.
 12 I thought that I'm invited because I know the material,
 13 I understand -- I am the expert for the defense, and
 14 they want my input on -- on things that Mr. Kaufman
 15 says.
 16 Q. Did they tell you that they wanted your
 17 input during the course of the deposition?
 18 MR. HILL: Objection.
 19 Instruct him not to answer.
 20 It calls for a communication with counsel.
 21 Q. BY MR. YALOWITZ: Does -- did -- did your
 22 communications with Mr. Hill and Mr. Satin, did they
 23 tell you their litigation strategy?
 24 MR. HILL: Objection.
 25 Instruct the witness not to answer.

1 Q. BY MR. YALOWITZ: In your communications
 2 with Mr. Hill and Mr. Satin, during the two hours
 3 and 15 minutes we spent off the record, did you
 4 suggest to them that there were things they could
 5 do to help improve their case?

6 MR. HILL: Objection.

7 Instruct the witness not to answer.

8 Q. BY MR. YALOWITZ: Did you ask -- did
 9 you suggest questions that Mr. Hill and Mr. Satin
 10 actually asked?

11 MR. HILL: Objection.

12 Instruct the witness not to answer.

13 THE WITNESS: My hands are tied.

14 Q. BY MR. YALOWITZ: For now. Did --

15 MR. HILL: I think, Kent, let me just --
 16 we can stipulate that, if you're going to ask him
 17 about communications with me that don't fall within
 18 the exception contained in Rule 26, I'm going to
 19 instruct him not to answer.

20 We're over the seven hours. Unless you
 21 have another line, I suggest that we conclude.

22 Q. BY MR. YALOWITZ: Well, what do you
 23 understand your role to have been at -- in this
 24 case?

25 A. I've provided an expert opinion on several

1 matters. One of them you have grilled me over in the
 2 last seven hours "neto" -- net. And the others were
 3 on the status -- the legal status of the West Bank and
 4 the implications of the settlements.

5 Q. Did you -- do you -- did you participate with
 6 Mr. Hill and Mr. Satin in -- in their advocacy mission
 7 for their client?

8 A. What's "advocacy mission"?

9 Q. So when you're counsel in a case, you're
 10 an advocate; right?

11 A. Right.

12 Q. So is -- was that your role in this case?

13 A. To be an advocate?

14 Q. Yeah.

15 A. Absolutely not.

16 Q. Why were you having privileged communications
 17 with Mr. Hill and Mr. Satin at Mr. Kaufman's deposition?

18 MR. HILL: Objection. I'm not sure the
 19 witness has a foundation to answer that question.

20 He can respond if he knows.

21 THE WITNESS: I don't know what America law
 22 says about privileged communications. That's between
 23 you two.

24 Q. BY MR. YALOWITZ: Right. So you were --
 25 you were discussing their litigation strategy;

1 right?

2 MR. HILL: Objection.

3 Instruct the witness not to answer.

4 MR. YALOWITZ: You're --

5 MR. HILL: Communications with me.

6 MR. YALOWITZ: You're instructing the witness
 7 not to answer if he was discussing litigation strategy?

8 MR. HILL: I don't know how the witness can
 9 answer the question without revealing communications
 10 with counsel, which are privileged.

11 MR. YALOWITZ: He can say "yes" or "no."

12 MR. HILL: Well, that would reveal --

13 Q. BY MR. YALOWITZ: Can you answer the question
 14 "yes" or "no"?

15 MR. HILL: That would reveal the content of
 16 the communication. So I'll instruct him not to answer.

17 MR. YALOWITZ: All right. I think the court
 18 will draw the inference that he did, in fact, discuss
 19 litigation strategy.

20 MR. HILL: I don't agree.

21 We're over the seven hours. Do you have any
 22 other questions you want to ask him that don't pertain
 23 to protected communications? If you do, let's have
 24 them. If not, why don't we wrap up?

25 MR. YALOWITZ: All right. Why don't we take

1 a break, and we'll reflect on this and -- and --

2 MR. HILL: Well, let's take a quick break --

3 MR. YALOWITZ: -- circle back.

4 MR. HILL: -- because, as I told you, I need
 5 to travel. So --

6 MR. YALOWITZ: I understand. I understand.
 7 I do too.

8 MR. HILL: Okay.

9 (Recess from 6:05 p.m. to 6:07 p.m.)

10 Q. BY MR. YALOWITZ: All right. Mr. Sfard,
 11 thank you so much for coming to visit with me today
 12 and for staying late and starting early. It's been
 13 a lengthy and spirited conversation. And I think
 14 you've answered the questions in the spirit in which
 15 you -- your reputation precedes you.

16 A. Thank you very, very much.

17 Q. All right.

18 MR. HILL: For the record, by my count,
 19 we're at seven hours and eight minutes. So I'd ask
 20 that you pay Mr. Sfard for seven hours of his time.
 21 You can make the check out to his firm and deliver
 22 it to me, and I'll take care of getting it to him.

23 Thank you very much.

24 MR. YALOWITZ: All right.

25 (The deposition concluded at 6:08 p.m.)

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1 CERTIFICATE OF REPORTER
23 I, BRENDA MATZOV, CA CSR No. 9243, do hereby
4 certify:5 That, prior to being examined, the witness
6 named in the foregoing deposition was duly sworn by me
7 to testify the truth, the whole truth, and nothing but
8 the truth;9 That the foregoing deposition was taken before
10 me at the time and place herein set forth, at which time
11 the aforesaid proceedings were stenographically recorded
12 by me and thereafter transcribed by me;13 That the foregoing transcript, as typed, is a
14 true record of the said proceedings;15 And I further certify that I am not interested
16 in the action.17
18 Dated this 20th day of December, 2013.
19
2021 BRENDA MATZOV, CA CSR No. 9243
22
23
24
25

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1 ERRATA SHEET
2

3 Case: MARK I. SOKOLOW, et al. vs. THE PALESTINE

4 LIBERATION ORGANIZATION, et al.

5 Date: OCTOBER 24, 2013

6 Witness: MICHAEL SFARD

7 Page ____ Line ____ Change _____

8 Reason _____

9 Page ____ Line ____ Change _____

10 Reason _____

11 Page ____ Line ____ Change _____

12 Reason _____

13 Page ____ Line ____ Change _____

14 Reason _____

15 Page ____ Line ____ Change _____

16 Reason _____

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18 Reason _____

19 Page ____ Line ____ Change _____

20 Reason _____

21 Page ____ Line ____ Change _____

22 Reason _____

23

24 MICHAEL SFARD, Witness Date
25

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1 CERTIFICATE OF WITNESS/DEONENT
23 I, MICHAEL SFARD, witness herein, do
4 hereby certify and declare the within and foregoing
5 transcription to be my examination under oath in said
6 action taken on October 24, 2013, with the exception
7 of the changes listed on the errata sheet, if any;8 That I have read, corrected, and do hereby
9 affix my signature under penalty of perjury to said
10 examination under oath.11
12
13
14
15
16 MICHAEL SFARD, Witness Date
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| A | 280:10 | 205:11 | 101:11 111:4 | 47:7,22 119:7 |
|----------------------|--------------------|-----------------------|-------------------|-------------------------|
| aah | absolutely | accomplice | 196:18 | 133:5 221:23 |
| 25:6 29:2 35:2 | 23:17 30:10,10,11 | 13:13 68:9,24 | acquittal | 226:10 227:17 |
| 40:12 142:24 | 30:12 65:16,17,18 | 69:1,9 | 55:8 57:16,19 | 247:23 264:22 |
| 166:13 173:19 | 65:19 69:23 72:16 | accomplices | acquitted | 284:7 |
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